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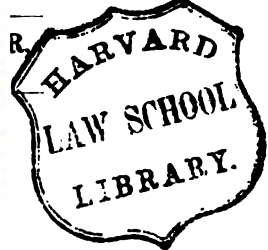
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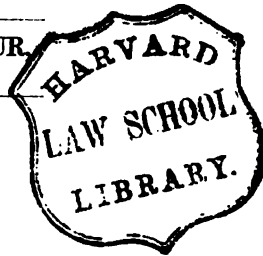
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REPORTS
OF
Cases in Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.



VOL. I.

ALBANY:
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1848.

Entered according to act of Congress, in the year one thousand eight hundred and forty-eight,
By GOULD, BANKS & GOULD,
in the clerk's office of the district court of the northern district of New-York.

G. M. DAVISON, STEREOTYPED & PRINTER,
SARATOGA SPRINGS.

PREFACE.

THE members of the legal profession are here presented with a volume of decisions, at law and in equity, of the supreme court of New-York, organized under the provisions of the new constitution of 1847. For the information of persons residing out of the state, the following brief analysis of our present judicial system is given. By section 8, of the 14th article of the new constitution, the offices of chancellor, justice of the then existing supreme court, circuit judge, vice chancellor, judges of the then county courts, and masters and examiners in chancery, except as therein otherwise provided, were abolished from and after the first Monday of July, 1847. Section 6, of the same article, gave to the chancellor and the supreme court, respectively, power to hear and determine such suits and proceedings pending in the court of chancery and supreme court as should be ready, on the 1st Monday of July, 1847, for hearing or decision; and provided for compensating the chancellor and judges until the 1st day of July, 1848, or until all such suits and proceedings should be sooner heard and determined. The old courts being thus swept out of existence, section 3 of the 6th article of the constitution established, in their stead, "a supreme court having general jurisdiction in law and equity." Section 4 provided for the division of the state into eight judicial districts, of which the city of New-York is one; the others are to be bounded by county lines, and to be compact, and equal in population, as nearly as possible. There are to be four justices of the supreme court in each district, with a provision for such an additional number in the district composed of the city of New-York as may from time to time be authorized by law. Such judges are to be classified so that one of the justices of each district shall go out of office at the end of every two years; and after the expiration of their terms under

such classification, the term of their office is to be eight years. Section 5, of the 6th article, declares that the legislature shall have the same powers to regulate the jurisdiction and proceedings in law and equity, as they have heretofore possessed. Section 6 directs that provision shall be made by law for designating, from time to time, one or more of such justices to preside at the general terms of the court to be held in the several districts. It also authorizes any three or more of such justices, of whom the presiding justice shall always be one, to hold such general terms; and any one or more of them to hold special terms and circuit courts, and any one of them to preside in courts of oyer and terminer. The 12th section of the same article directs that the justices of the supreme court shall be *elected* by the electors of the several judicial districts, at such times as may be prescribed by law. The 4th section of the 14th article directed that the first judicial election should take place at such time between the first Tuesday of April and the second Tuesday of June, 1847, as might be prescribed by law; and that the courts should respectively enter upon their duties on the first Monday of July thereafter, but that the term of office of the judges and justices should be deemed to commence on the first day of January, 1848.

To carry out these provisions of the new constitution, the legislature, on the 12th day of May, 1847, passed an "act in relation to the judiciary." (*Laws of 1847, p. 319.*) By the 14th section of the third article of that act, it was provided that the justices of the supreme court elected at the first election should be classified by lot, in the manner and at the time therein directed; that the classes should be numbered one, two, three and four, according to the time of service of each; the class having the shortest time to serve being number one, and the term of office of those drawn in that class being two years, and the terms of those drawn in the other classes being four, six, and eight years. The 15th section provided that the justice in each judicial district having the shortest time to serve, and who was not a judge of the Court of Appeals, nor appointed or elected to fill a vacancy in the first class, should be a presiding justice.* By the 16th section it was declared that the supreme court should possess the same powers, and exercise the same jurisdiction, as was then possessed and exercised by the

* By the act of April 4, 1848, the 15th section of the judiciary act is amended so as to provide that in case of the death, absence, or inability of the presiding justice appointed to hold any general term, any three justices convened to hold such term may designate one of their number to preside at such general term. (*Laws of 1848, p. 282.*)

existing supreme court and court of chancery ; and that the justices thereof should possess the powers, and exercise the jurisdiction, then possessed and exercised by the justices of the supreme court, chancellor, vice chancellors, and circuit judges, so far as the powers and jurisdiction of said courts and officers should be consistent with the constitution, and the provisions of that act. The 6th section of the second article of this act, provided that four justices of the supreme court, to be judges of the Court of Appeals, should every year be selected from the class of said justices having the shortest time to serve ; and alternately, first, from the first, third, fifth, and seventh judicial districts, and then from the second, fourth, sixth and eighth districts ; and that they should serve as judges of the Court of Appeals until the last day of December, 1848. Four justices of the supreme court having been selected for judges of the Court of Appeals, in pursuance of this section, viz. one from the first, one from the third, one from the fifth, and one from the seventh districts, the supreme court was composed of 28 judges during the time of these reports.

The judiciary act made provision for the holding of a general term of the supreme court in every county having a population exceeding forty thousand, at least once in each calendar year, and as much oftener as the business of the county should require, and in every other county, except Hamilton, as often as once in two years ; and directed that such terms, in the last mentioned counties, should be so arranged that at least one term should be held in each county, or in a county adjoining, in every calendar year. It also provided for the holding of at least two special terms in each county, except Hamilton, to hear and determine non-enumerated business in suits and proceedings at law, and to take testimony, and hear and determine suits and proceedings in equity ; and for a re-hearing of such suits and proceedings, at a general term. The act also directed that each of the justices should, during the term of his office, be employed in holding the general and special terms of the supreme court, the circuit courts, and courts of oyer and terminer, in each of the several judicial districts, in proportion as nearly equal as might be, to the business of such courts in the districts respectively ; and that their duties should be so assigned that each justice should hold an equal proportion, as near as might be, of the general and special terms of the several courts.

The above summary will give an idea of the organization, jurisdiction, and powers of the new court. And the decisions contained in this volume will, it is confidently believed, convey a very favorable impression of the learning and ability of the judges, and demonstrate

the soundness of the principle which gave to the people the power of electing their judges.

It was the intention of the reporter to arrange the several cases according to their respective dates; and the printing of the present volume was commenced upon that plan. But it was found impossible to adhere strictly to a chronological arrangement; some of the earlier cases not having been put into the reporter's hands until after a considerable portion of the volume had been printed. The order of publication was thus unavoidably broken in upon, and a derangement of dates was occasioned. This is not, however, of much importance, perhaps, except as being a slight blemish upon the mechanical execution of the book. Each case is preceded by a memorandum of the date, county, the nature of the term, and the names of the judges by whom the cause was decided. This memorandum denotes the time and place of the *decision*, without reference to the time or place of *argument*. Whenever a cause is decided in vacation, however, the date given is that of the term at which the cause was argued.

The Reporter avails himself of this opportunity to express his most grateful acknowledgments to the judges of the court for the "generous confidence" which they gave him, in advance, by according to this undertaking their countenance and approval, and for the numerous facilities they have furnished for the prosecution of the same. To the members of the bar also, for their cheerful co-operation and assistance, and for the flattering reception which portions of the volume met with, during its progress through the press, he tenders his hearty thanks.

The second volume, containing the decisions of the court subsequent to the close of the first, will be put to press at an early day.

O. L. B.

SARATOGA SPRINGS, JULY 10, 1848.

JUSTICES OF THE SUPREME COURT.

FIRST JUDICIAL DISTRICT.

- CLASS 1. SAMUEL JONES.*
2. ELISHA P. HURLBUT,† Presiding Justice.
3. JOHN W. EDMONDS.
4. HENRY P. EDWARDS.

SECOND JUDICIAL DISTRICT.

1. SELAH B. STRONG,† Presiding Justice.
2. WILLIAM T. McCOUN.
3. NATHAN B. MORSE.
4. SEWARD BARCULO.

THIRD JUDICIAL DISTRICT.

1. WILLIAM B. WRIGHT.*
2. IRA HARRIS,† Presiding Justice.
3. MALBONE WATSON.
4. AMASA J. PARKER.

FOURTH JUDICIAL DISTRICT.

1. DANIEL CADY,† Presiding Justice.
2. ALONZO C. PAIGE.
3. JOHN WILLARD.
4. AUGUSTUS C. HAND.

FIFTH JUDICIAL DISTRICT.

1. CHARLES GRAY.*
2. DANIEL PRATT,† Presiding Justice.
3. PHILO GRIDLEY.
4. WILLIAM F. ALLEN.

JUSTICES OF THE SUPREME COURT.

SIXTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM H. SHANKLAND,† Presiding Justice.
2. HIRAM GRAY.
3. CHARLES MASON.
4. EBEN B. MOREHOUSE.

SEVENTH JUDICIAL DISTRICT.

1. THOMAS A. JOHNSON.*
2. JOHN MAYNARD,† Presiding Justice.
3. HENRY WELLES.
4. SAMUEL L. SELDEN.

EIGHTH JUDICIAL DISTRICT.

1. JAMES G. HOYT.†
2. JAMES MULLETT, Presiding Justice.
3. SETH E. SILL.
4. RICHARD P. MARVIN.

* Judges of the Court of Appeals until January, 1849.

† Judges of the Court of Appeals for the year 1849.

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ERRATA.

Page 36, line 90, strike out "former" and insert "latter."

Page 318, last line, strike out "regulating" and insert "respecting."

CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

TOMPKINS GENERAL TERM, August, 1847. *Shankland, H.
Gray, Mason, and Morehouse, Justices.*

LATOURETTE and wife *vs.* WILLIAMS.

Where a husband pledges, as security for a temporary loan, a note given to his wife before marriage, and afterwards redeems the note and receives it back, this is not such a reduction of the same into his possession as will destroy the wife's interest in it, or authorize the husband to sue thereon in his own name only.

A *chase in action* belonging to the wife will not be considered as reduced by the husband into his possession, merely by his having the actual possession of the instrument.

It is necessary that the money should be actually received by him, or by a third person as his agent, for his use; or that a judgment should be recovered, and an execution issued, in the name of the husband and wife, or in the name of the husband alone.

The wife's title by survivorship, to her *chase in action*, can only be barred by a release of the demand by the husband, or by a sale of it, either absolute or conditional.

The act of pledging a note does not pass the title to the pledgee; but the title remains in the pledgor.

THIS was an action of assumpsit, brought to recover the amount of a promissory note for \$275, executed by the defen-

Latourette v. Williams.

dant, and payable to one of the plaintiffs before her marriage with her husband, her co-plaintiff in this suit. The cause was tried at the Tompkins circuit in August, 1845, before Edmonds, circuit judge. The defendant relied upon the following facts as a defence, viz. that Latourette, the husband, after the marriage, had borrowed fifty dollars of a neighbor, and deposited the note in question with him, as a security for the repayment, and that in a short time afterwards he repaid the money, and received back the note. The circuit judge thereupon decided that it being undisputed that the note had been pledged by the husband for the repayment of a sum of money, and afterwards redeemed, an action thereon in the joint names of the husband and wife would not lie. And he directed the jury to find a verdict for the defendant. The plaintiff excepted to such decision, and now moves for a new trial.

By the Court, SHANKLAND, Presiding Justice. It is a well settled principle of law, that a husband cannot maintain a suit in his own name to recover a demand which accrued to his wife before marriage, under a contract made with her: the wife must be joined in the action. (*Morse v. Earl*, 13 *Wend.* 271.) Was the act of pledging the note in question, to secure the payment of a loan of money, and afterwards redeeming it, such a reduction of it to possession by the husband, as to destroy the wife's interest in it? I think not. Nothing short of a release of the demand, or a sale of it, either absolute or conditional, will have that effect. But merely pledging a note does not pass the title, as a sale or mortgage does. (12 *John. Rep.* 146. 5 *Id.* 258.) In the case of a pledge, the title remains with the pledgor. (*Id.*) In case of a mortgage, the title passes at law, although in equity it is considered as a mere lien.

It is said in the books that if the husband reduces his wife's *choses in action* into possession, it will operate as an effectual bar to her right of survivorship; but by this is not meant his mere actual possession of the instrument. It means either his receiving the money, or the reception of it by some third person as his agent, for his use, or by the recovery of a judgment

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and the issuing of an execution in the name of husband and wife, or in the name of the husband alone. (*Clancy's Rights of Married Women*, 111, 112, 113. *Moehring v. Mitchell*, 1 Barb. Ch. Rep. 271.) And where husband and wife sue on a chose in action belonging to the wife *dum sola*, it will survive to the wife, unless the husband has issued execution; because, as the action in such a case *must* be brought in the name of the husband and wife, no inference of the husband's intention to deprive her of the right of survivorship can be drawn from the suit being brought in their joint names. But the issuing of an execution is considered evidence of the husband's intention to reduce the chose in action into possession, and thus to bar his wife's title by survivorship. (3 Atk. 20. 2 Vesey, sen. 677.) So the wife's title by survivorship to her choses in action may be barred by the assignment of the husband, for a valuable consideration. (1 P. Wms. 380. *Clancy*, 120.)

In this case the husband has neither mortgaged, sold, nor assigned the demand; and the mere act of pledging the note to another, as security for a temporary loan, was no evidence of an intention to appropriate it to his own use; and his redeeming it afterwards, placed it in all respects in *statu quo*.

A new trial is granted, with costs to abide the event.

OSWEGO SPECIAL TERM, September, 1847. Allen, Justice.

OVERSEERS OF THE POOR OF CLAYTON v. BEEDLE.

A writ of error is a statutory remedy, and must be strictly pursued; and a party seeking the benefit of the writ must bring himself, and his case, within the statute. A writ of error cannot be brought upon a judgment in a personal action, by any person other than the party against whom the judgment was recovered; or, in case of his death, by his personal representatives.

There is no privity between overseers of the poor who have brought a suit in their official character, and their successors in office, which will enable the latter to bring a writ of error upon the judgment recovered in that suit.

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Nor can such successors be substituted as plaintiffs in a writ of error pending at the time of their election, or afterwards brought, in the names of the previous overseers, to reverse a judgment recovered against them.

A writ of error is not a *suit*, or *action*, within the meaning of the section of the statute which provides that no suit commenced by or against certain public officers shall be abated or discontinued by the death of such officers, or their removal or resignation, or the expiration of their term of office, but that the court in which the action is pending shall substitute the names of the successors in such office.

AN action was brought in the common pleas of Jefferson county, by the present plaintiffs in error, as overseers of the poor of the town of Clayton, to recover penalties for the violation of the excise law, (1 R. S. 677,) and judgment was rendered in that court in December, 1846, for the defendant, and against the plaintiffs, for costs. In January, 1847, the plaintiffs sued out a writ of error, removing the judgment to the supreme court; and in February thereafter Plumb and another were elected overseers of the poor of the town of Clayton, in place of the present plaintiffs in error; after which time the plaintiffs in error, without any substitution or change of parties, assigned errors. The defendant now moves to set aside the assignment of errors as irregular, and to substitute the newly elected overseers of the poor as the plaintiffs in error.

B. Bagley, for the defendant in error.

T. C. Chittenden, for the plaintiffs in error.

ALLEN, J. It is provided by 2 R. S. 474, § 100, that "no suit commenced by, or against, any officers named in this article, shall be abated or discontinued by the death of such officers, their removal from, or resignation of, their offices, or the expiration of their term of office; but the court in which any such *action* shall be pending shall substitute the names of the successors in such office, upon the application of such successors or of the *adverse party*." Overseers of the poor are among the officers named in the article, and if the section quoted is applicable to a writ of error, then the motions must be granted. But

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if not, then the assignment of errors is irregular, and there is no authority to direct the substitution of parties which is asked for.

A writ of error is a statutory remedy, and must be strictly pursued; and a party seeking the benefit of the writ must bring himself, and his case, within the statute. Writs of error must be brought (1) By the party against whom the judgment complained of was rendered; (2) In case of his death, by his executors or administrators, if the judgment was to recover any debt or damage only, or to recover any interest in lands declared by law to be personal assets. (2 *R. S.* 591, § 2.) And subdivisions three and four of that section prescribe by whom writs of error shall be brought in certain cases, if the judgment was for the recovery of real estate, or the possession thereof. I find no provision for the bringing a writ of error upon a judgment in a personal action by any person other than the party against whom the judgment was recovered, or, in case of his death, by his personal representatives. There appears to be no reason why, in a case like the present, the successors in office of the officers against whom a judgment has been recovered, for the costs of a suit commenced by them, should be permitted to bring a writ of error to reverse the judgment. The officers against whom the judgment has been recovered are primarily the only parties aggrieved. Against them the execution is by law to issue, and after it shall have been collected of them individually, the amount thereof shall be allowed to them in their account of official expenditures, by the board authorized to audit such accounts, if such suit appears to have been necessarily commenced in good faith. (2 *R. S.* 475, § 107.) It by no means follows that the public are at all aggrieved by the judgment, or interested in its reversal. And in every case, but for the statute, a judgment would necessarily be collected of the parties to the record against whom the recovery was had, irrespective of the character in which they sued or were sued. And for all purposes, other than those provided by statute, the plaintiffs and defendants named in the record must be considered as the "parties," and subject to all the duties and liabilities, and entitled to all the rights and privileges of "parties" in other cases.

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And their successors in office, or other persons, can only become parties and take such direction of the suit as is authorized and directed by statute. There is no express provision in the statute authorizing any person but the party against whom the judgment was recovered to bring a writ of error; and there is no *privity* between the plaintiffs in this case and their successors in office, recognized either by the statute or common law, which would enable such successors to bring a writ of error upon the judgment. (*Grout v. Chamberlin*, 4 Mass. Rep. 611.) It follows, that if the successors in office of the plaintiffs in error had been elected before error brought in this case, they could not have brought such writ, naming themselves plaintiffs in error. And if they could not sue out such a writ in their own names, must they be substituted as plaintiffs in a writ of error pending at the time of their election, or afterwards brought, in the names of their predecessors in office, to reverse a judgment recovered against them for costs? It seems to me that any fair construction of the statute would require the writ to be *prosecuted* by the party who is required to *bring* it. It would hardly require one man to bring the suit, and another to prosecute it. It cannot be that the law requires a writ of error to be brought by one person, and the name of another to be immediately thereafter substituted as plaintiff in error, as would be required in a case like the present if the writ of error was to be brought *after* the election of the new officers, and the position of the defendant's counsel is correct.

But aside from the difficulty growing out of the act to provide for, and regulate, writs of error, cited above, I cannot bring myself to the opinion that a "writ of error," or the *proceedings* upon a writ of error, are within the provisions of the section upon which this motion is founded. (2 R. S. 474, § 100.) It does not appear to be necessary to decide whether, as was contended, the provisions of 2 R. S. 553, §§ 17, 18, providing for the service of suggestions in certain cases, and for the trial of such suggestions, apply to a case like the present. I am inclined to think they do not, for the reason, amongst others, that the statute authorizing a substitution of plaintiffs appears to contem-

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plate a summary application to the court in which the action is pending ; and that the court should order the substitution upon the application of either party. Of course in making up the record, a suggestion of the change would be made ; but there is nothing upon which an issue can be found. If applicable, however, there is nothing in the situation of this cause to prevent the execution of the statute. An issue of fact could be joined which the court might order to be tried by a jury. But whether it is necessary, in a proper case for a substitution of parties to the record under the statute, to serve a copy of a suggestion upon which an issue of fact may be joined, is wholly immaterial in this case. For I am of the opinion that a "*writ of error*" is not a "*suit*" or an "*action*," within the meaning of the statute referred to. Mr. Justice Jewett, in *McDonald v. The Savings Bank in the City of New-York*, (2 *Howard's Pr. Rep.* 35,) held that the act in relation to the bringing of *suits* by poor persons, (2 *R. S.* 444,) did not extend to writs of error, for the reason that the statute was express in its provisions in regard to bringing writs of *error* ; which provisions must be complied with.

The same question was decided, in the same way, by the late Justice Cowen, in *Moore v. Cooley et al.* (2 *Hill's Rep.* 412.) He says, "An error on which a writ lies is not a cause of action." "No book holds the word *action*, or words *cause of action*, to be identical with a writ of error, or cause of a writ of error."

The section under consideration provides that no "*suit*" commenced &c. shall abate &c. The word *suit* is here used in its modern sense, and as synonymous with *action*. A suit is defined to be "the prosecution or presentment of some claim, demand or request. In law language it is the prosecution of some demand in a court of justice." (3 *Story's Com. on Const.* § 1719.) The words "*suit*" and "*action*" are used as synonymous, in the section of the statute now under consideration. By that section it is provided that "the court in which any such action shall be pending shall substitute the names" &c. A civil action is defined to be a legal demand of one's right ; or it is the form of a suit given by law for the recovery of that which

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is due. Till *judgment* the suit is called an *action*. (*Bouvier's Law Dict. tit. Action.*) A writ of error is not a suit or action, as those words are understood and used. And I am well satisfied that the provisions of the act authorizing a substitution of parties in a suit or action pending do not extend to the case of a writ of error; and that the assignment of errors is regular, and that the newly elected overseers of the poor cannot be substituted as plaintiffs in error.

Motion denied.

SAME TERM. *Before the same Justice.*

ANGELL vs. KELSEY.

Where the declaration, in an action of covenant, contained several counts, in each of which the instrument counted upon was set out, and but one breach assigned; and the defendant, after craving oyer, pleaded *non est factum*, and then demurred to each count generally, commencing the demurrer substantially as follows: "And the said defendant says that the first count of the said plaintiff's declaration is not sufficient," &c.; Held that the defendant was bound to elect whether he would abide by the pleas, or by the demurrers.

The rule that a party cannot plead and demur to the same pleading, is applicable to such a case.

Each breach assigned in a declaration is to be considered a distinct count, for the purposes of pleading; and the covenant as set out is applied to each breach.

Where several breaches are assigned, the defendant may demur to one and plead to the others. But where the count is indivisible, he cannot plead to part, and demur to part.

THIS is an action of covenant. The declaration contains several counts, in each of which the instrument counted upon is set out, and but one breach assigned. The defendant, after craving oyer, pleaded *non est factum*, and then demurred to each count, commencing the demurrer substantially as follows: "And the said defendant says that the first count of the said plaintiff's declaration is not sufficient," &c. The plaintiff there-

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upon moved that the defendant be compelled to elect whether he would abide by the plea, or by the demurrers.

T. C. Chittenden, for the plaintiff.

J. Mullen, for the defendant.

ALLEN, J. The defendant insists that the plea of *non est factum* only putting in issue the execution of the instrument, he has a right to unite with that plea a demurrer to each of the breaches assigned. Admitting this to be true, to the extent claimed by the counsel who opposed the motion, I cannot think that this case is brought within the rule. The defendant has not confined his demurrer to any particular part of the several counts. Under the demurrer, any defect in the declaration, whether in that part which sets out the instrument declared upon, or in the assignment of breaches, could be made available. The demurrer says that the "count is bad," not that "the first or second breach is badly assigned." It is true, the causes of the demurrer point out defects in the assignment of breaches, but this is only material in respect to costs in case of an amendment. The defendant, under this demurrer, may avail himself of any substantial defect in the count. The pleader should have taken especial care that the part of the declaration covered by the plea was not also reached by the demurrer; as is clearly the case here. The rule that a party cannot plead and demur to the same pleading is, therefore, applicable in all its force. And that this rule is applicable, to all cases, see *Wheeler v. Curtis*, (11 *Wend.* 653;) *Dearborn v. Kent*, (14 *Id.* 183;) *Russell v. Rogers*, (15 *Id.* 351;) 1 *Chit. Pl.* 230.)

But if it is conceded that the demurrers are technically correct, and only extend to the breaches assigned, and do not cover that part of the declaration to which the plea of *non est factum* is applicable, I am still of the opinion that the pleading is irregular in this particular case; it being conceded that *only one breach* is assigned in each count. There is certainly no

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necessity to adopt this method of pleading, to save the rights of the parties. When several breaches are assigned in the same count, it may be necessary to plead differently to each. Each breach is supposed to give a cause of action, and in effect to form a count by itself; and but for the rules of pleading peculiar to this action, and which have been extended to actions of debt on bond, each breach would necessarily form a count by itself. Hence the necessity of considering each breach a distinct count for the purposes of pleading; and the covenant, as set out, is applied to each breach. When the defendant pleads to one breach, and demurs to another, he pleads to the covenant in connection with the breach to which he pleads, and demurs to it in connection with the other; the same as if each breach was made a distinct count; the instrument being recited in each. The *covenant* must be *read* with the breach to make either, as the foundation of an action, intelligible. The authorities are all to the effect that where *several* breaches are assigned, the defendant may demur to one and plead to the others. (*Com. Dig. Pl. 2, v. 3.*) But there is no adjudication that I can find, that in a case like the present, when the count is indivisible, you can plead to part and demur to part. There are two *dicta* to that effect in our courts; but as they are not *decisions*, they are not binding as authorities, and the decisions in these cases are consistent with the rule. Suffering the pleadings to stand as put in, would leave the plaintiff entitled to a verdict, perhaps, after the court had held that there was no cause of action.

Motion granted with costs.

NEW-YORK SPECIAL TERM, September, 1847.

Edmonds, Justice.

ADRIANCE *vs.* THE MAYOR, &c. OF NEW-YORK.

Whether a court of equity has jurisdiction to interfere, by injunction, to prevent the common council of a city from wasting the funds of the city, by appropriating them to purposes not warranted by their act of incorporation? *Quære.*

In a clear case of want of jurisdiction, the court will, *ex mero motu*, refuse to grant the plaintiff the relief asked for, although the defendants have suffered the bill to be taken as confessed.

But where the jurisdiction of the court is doubtful, if the defendants, by suffering the plaintiff's bill to be taken as confessed, have conceded the jurisdiction of the court, as well as admitted their own delinquency, jurisdiction will be taken of the suit, and the relief asked for granted.

IN EQUITY. The plaintiff filed his bill setting forth that he was the owner of real estate in the city of New-York, and a tax-payer. He charged that the common council of the city were improvidently wasting the funds thereof by appropriating them to purposes not warranted by their act of incorporation; and specifying particularly two instances of such misapplication of the funds. First; that they had appropriated the sum of \$5000 as an outfit for the first regiment of New-York volunteers for the Mexican war. Second; that they had directed the payment of the sum of \$16,000, being the amount of penalties, costs, and counsel fees in certain suits brought against the supervisors of New-York for violation of duty in refusing to pay the salaries of the judges of the court of sessions. The bill prayed for a perpetual injunction to restrain the defendants from paying those sums. The bill having been taken as confessed by the defendants,

R. Mott, for the complainant, now moved for a final decree.

EDMONDS, J. I have my doubts whether the court has jurisdiction to interfere in such a case as this. But as the defendants, by suffering the bill to be taken as confessed, have

Newland v. Willetts.

conceded the jurisdiction of the court, as well as admitted their own delinquency, I do not know that I ought to refuse the relief asked for. Were it a clear case of want of jurisdiction, I should feel obliged, *ex mero motu*, to deny the application. But as I am not clear on the point of jurisdiction, I do not think I ought to permit my doubts to operate so far as to deny the relief asked for; when the defendants have confessed as well jurisdiction as title to relief. The bill showing that the appropriation for the Mexican volunteers has been already paid, the injunction of course will be granted only in regard to the other item.

SAME TERM. *Before the same Justice.*

NEWLAND vs. WILLETTTS, sheriff, &c.

The court will allow a new replevin bond to be filed, *nunc pro tunc*, where the one given upon the execution of the writ was defective.

THIS was a motion by the defendant to set aside a writ of replevin, and all subsequent proceedings on the part of the plaintiff, for irregularity. It appeared from the return of the coroner who served the writ, that the bond taken by him upon the execution thereof had but one surety, instead of two, as required by the statute. And the return did not state the addition, residence, or occupation of the surety. After the service of notice of this motion, the defendant executed a new bond, with two sureties, and gave notice to the plaintiff's attorney of the giving of such bond to the coroner, with the additions, residences and occupations of the sureties. The plaintiff, upon an affidavit stating that fact and that the irregularity, if any, was the fault of the coroner, made a cross motion for leave to amend the

Green v. Ward.

coroner's return, by adding thereto the names of the sureties, with their additions, &c.

A. Child, for the plaintiff.

D. D. Field, for the defendant, cited 2 R. S. 431, § 7; 18 Wend. 581, 583; 19 Id. 632.

EDMONDS, J., decided that the motion to set aside the writ was regular; but that, as it is usual to allow a new bond to be filed, and as one had been filed, he should deny the motion of the defendants; their costs of the same, \$10, to abide the event of the suit; the plaintiff to have no costs in any event. And the defendant to have the usual time to except to the sufficiency of the sureties in the new bond.(a)

(a) See 2 R. S. 556, §§ 33, 34.

SAME TERM. Before the same Justice.

GREEN vs. WARD.

Method of investing moneys in court, on bond and mortgage; and of ascertaining the sufficiency of the security.

Murray Hoffman, on an order directing a guardian to pay \$5000 into court, and the clerk to invest the same on bond and mortgage, presented a petition praying that a bond and mortgage for \$3000, which he exhibited, might be taken as part of that investment, and that the guardian pay the balance, only, into court.

EDMONDS, J. Great difficulties must necessarily attend the investment, on bond and mortgage, of moneys in court, under

Lahens v. Fielden.

the present system. The clerk of the court of appeals is alone charged with the custody of the moneys in court, and will alone be authorized to make such investments. He will be continually receiving such orders, from all parts of the state. And residing, himself, at Albany, it cannot be expected that he will have any personal knowledge as to the value of property, excepting such as may be in the immediate vicinity of his residence. He will, therefore, be obliged either to take security upon lands at a distance from the parties interested in the fund, or, if he invests in the neighborhood of the parties in interest, then he must take a mortgage upon lands of whose value he can have no personal knowledge. To remedy this inconvenience, it is suggested that the parties in interest themselves select a proper place for investment, and have a reference to ascertain its suitability and propriety. And that upon the coming in of the report they enter an order directing the clerk of the court of appeals to invest upon the specific bond and mortgage mentioned in the report. There must be an order directing a reference to ascertain whether the \$3000 bond and mortgage is a proper investment in this case, and as to what will be a proper investment of the balance of \$2000.

SAME TERM. *Before the same Justice.*

LAHENS and others *vs.* FIELDEN and others.

A master extraordinary in England has no power to take the oath of a person residing there, to an answer to a bill in chancery filed against such person in this state. An answer put in by a defendant residing out of the state, must be sworn to before a judge of some court having a seal; who is actually a member of such court. And that fact must be certified by the clerk of the court.

IN EQUITY. This was a motion by the complainants to take the answer of one of the defendants off the files of the court; on the ground that it had not been properly sworn to

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by him. The defendant resided in England ; and the answer put in by him had been sworn to before a master extraordinary of the English court of chancery.

W. W. Van Wagenan, for the complainants.

M. Hoffman, for the defendants.

EDMONDS, J. The 32d rule of this court in equity allows the answer of a person residing out of this state, to be sworn to in the manner prescribed by law for taking affidavits out of the state, which is, before a judge of a court having a seal. (2 R. S. 396, § 33.) Is a master extraordinary of the English court of chancery such an officer? He is appointed to act in the country, in the several counties more than twenty miles distant from London, by taking affidavits, recognizances, acknowledgments of deeds, &c. (2 Toml. Law Dict. 537.) The officer required by our statute must be something more than a commissioner of deeds, or clerk authorized to administer oaths; something more even, perhaps, than a master in ordinary or referee, who is sometimes authorized to adjudge matters in court. He must be a "member of the court;" for that must be certified by the clerk of the court, under its seal. That is not certified in this case. The clerk merely certifies that Mr. Miller is an officer of the court, not that he is a member of the court; which is necessary, under our statute.

Motion granted.

SAME TERM. *Before the same Justice.*

BROWN vs. MILLER.

A reference to ascertain the amount of damages sustained by the plaintiff will not be granted, after a default for want of a plea, upon a mere general affidavit that the inquiry involves the examination of a long account: but the production of a sworn copy of the account on which the suit is brought will be required.

The defendant's default for want of a plea having been entered, the plaintiff's attorney, upon a general affidavit that the inquiry involved the examination of a long account, moved, *ex parte*, for a reference to ascertain the amount of damages.

EDMONDS, J. Cases of this kind have occurred where the damages could very conveniently have been ascertained by a sheriff's jury, but where the plaintiff's attorney, upon an affidavit like this, has obtained a rule of reference, and very largely and unnecessarily augmented the costs. To guard against such an abuse of the statute, I shall in future exact from the plaintiff's attorney a sworn copy of the account on which the suit is brought; so that the court may judge for itself as to the necessity of a reference.

SAME TERM. *Before the same Justice.*

THE UNITED STATES vs. DUMPLIN ISLAND.

Proceedings to ascertain the damages of the owner of land taken by the United States, under the act of May 5, 1847, (*Laws of 1847, p. 189*), need not be instituted by, or in the name of, the governor of this state.

It is his duty to apply, as chief magistrate, only when the land of a private citizen is wanted for the use of the state.

The statute which directs that when land is wanted for the use of the United States,

The United States v. Dumplin Island.

and it becomes necessary to issue a writ of inquiry of damages, the like proceedings shall be had as upon applications on behalf of the state, is sufficiently complied with, as respects the manner of commencing the proceedings, if they are instituted in behalf of the United States, by officers authorized to act for the executive, in the premises.

The inquisition taken under a writ *ad quod damnum* should find who is the owner of the land taken, the amount of the damages, and to whom the same are to be paid. It should also provide for the payment of the owner's costs and expenses.

By the act of May 5, 1847, (*Laws of 1847*, p. 189,) jurisdiction of a small island in Long Island sound called the North Dumplin, was ceded to the United States for the purpose of erecting a lighthouse thereon; and the United States were authorized, in case they could not agree with the owner, for the purchase of it, to apply for the writ *ad quod damnum*, under the revised statutes, (2 R. S. 588,) to assess the owner's damages. A writ of *ad quod damnum* having been issued and executed,

B. F. Butler, U. S. district attorney, moved to confirm the inquisition taken under the same.

T. Sedgwick, for the owner of the island, objected, 1. That these proceedings ought to have been instituted by the governor of the state, and could not be commenced by any other person or officer; 2. That it is not competent for the state to assign to the United States its eminent domain for any purpose foreign to the use of the state; and 3. That the inquisition does not find who is the owner, nor to whom the money is to be paid, nor does it provide for the owner's costs and expenses, but only for the value of the land.

F. F. Marbury, in behalf of John Van Buren, attorney general of the state, moved for a reference to ascertain to whom the amount of the award should be paid.

EDMONDS, J. I do not think there is any thing in the objection that these proceedings are to be instituted by, and in the name of the governor of this state. It is his duty to apply, as chief magistrate, only when the land is wanted for the use of

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the state. When land is wanted for the United States, and it becomes necessary to issue a writ of inquiry, the statute (2 R. S. 590, § 76,) provides that the *like proceedings* shall be had as those directed upon applications on behalf of the state. The proceedings will be to all intents and purposes alike if the chief magistrate of the United States directs the proceedings to be instituted; and it is not necessary for him to institute the proceedings personally. It is enough, if it is done in behalf of the United States, by officers authorized to act for the executive in the premises.

I see then no irregularity in the proceedings previous to the issuing of the writ *ad quod damnum*. But I confess I am not satisfied with the inquisition. When the proceedings are instituted for the state, § 73 of the statute provides amply for the payment of damages and all costs and expenses incurred. So that the owner can be insured not merely the value of the land, but all costs and expenses to which he may be subjected, as well in procuring a proper valuation of his land, as in obtaining the money afterwards. But when the application is for the United States, no such provision is made; and unless those costs and expenses are included by the jury in their appraisal of the "damages," the owner must pay them himself; and the assessment, if it is only of the value of the premises, would necessarily fall short of adequate remuneration to the owner. The difficulty in the case is, that I do not know, and cannot from the papers determine, whether the jury have taken this view of their duty or not. If they had, I should be more likely to be satisfied with their appraisement.

But there would still be left another difficulty, and one which in this case would be somewhat material. The statute requires that the inquisition shall ascertain the names of the owners, their rights respectively, the amount to be paid, *and to whom particularly*.

The inquisition returns that the island is owned by William H. Winthrop, according to the best evidence furnished before the jury, and that the owner will sustain damage to the amount of \$400: but it is entirely silent as to whom the money shall

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be paid, as required by the statute. If the inquisition had found that, the money should be paid to Mr. W., then under the 75th section of the statute, he might obtain his money on presenting a petition to the court. But now if this inquisition is confirmed, on Mr. W.'s presenting his petition for the money in court, there must necessarily be a reference to ascertain to whom it ought to be paid. The attorney general already asks for such a reference. The expense of the reference would necessarily be defrayed from the fund; and for aught that I see, the owner may be subjected to the expense of attending the appraisement, and of getting his pay afterwards; thus it would seem preventing the award of the jury from being a just compensation to him, when the statute has been careful to provide that he shall be indemnified for the injury that he may sustain by reason of his lands being taken for the use of the public.

This inquisition must therefore be set aside, and a new one taken to supply these defects.

SAME TERM. *Before the same Justice.*

ROBINSON vs. ROBINSON.

The court will not grant a decree for divorce, upon a bill taken as confessed by the defendant, until after an inspection of the bill, proofs, and the affidavit of service of the subpoena upon the defendant.

IN EQUITY. This was a suit for a divorce, on the ground of adultery. The bill having been taken as confessed by the defendant, the counsel for the plaintiff, on an affidavit showing personal service of the subpoena upon the defendant, moved for a decree of divorce.

EDMONDS, J., after having examined the papers, granted the application. His honor said that, in order to guard against

Smith v. Averill.

collusion, and sham services of the papers in cases of this nature, he should hereafter, whenever a bill for divorce should be taken as confessed, refuse to grant a decree until after an inspection of the bill, proofs, and the affidavit of service of the subpoena upon the defendant.

SAME TERM. *Before the same Justice.*

SMITH & WALDRON vs. AVERILL.

Where a party meets an application made by his adversary to change the venue, by a stipulation not to give any evidence except as to facts occurring in the county where the venue is laid, the venue will not be changed.

MOTION to change the venue from New-York to Clinton county. It appeared that the defendants were sued for a bill of goods as partners, and they swore to a number of witnesses residing in Clinton county, their residence, to prove that they were not partners. On the other side it was shown that the claim did not rest on evidence of the fact of partnership, but on evidence that at the time of purchasing the goods both the defendants were present and represented themselves as being partners.

P. G. Ellsworth, for the defendants.

C. A. Rapallo, for the plaintiffs.

EDMONDS, J. If the facts as to the existence of the partnership were to be gone into, that would be a good reason, perhaps, for changing the venue. But as the plaintiffs' attorney swears that their case rests upon another ground, viz., representations made in New-York by the defendants, respecting the partnership; and as he now offers to stipulate not to give any

Lewis v. Rapelyea.

other evidence of the partnership than those representations, the venue may be retained in New-York, upon the giving of such a stipulation.

SAME TERM. *Before the same Justice.*

LEWIS vs. RAPELYEA.

Where more than two terms have elapsed since the giving of a cognovit by the defendant, and the plaintiff has died in the meantime, the court has no power to allow a judgment to be entered thereon.

THE plaintiff having commenced an action of assumpsit against the defendant, the latter gave a cognovit for the amount claimed. The plaintiff subsequently died, without having entered up judgment upon the cognovit; and the defendant refuses to allow judgment to be entered thereon, in favor of the plaintiff's personal representatives.

S. F. Clarkson, for the personal representatives, moved that judgment be entered in the name of the plaintiff: citing *Ryghtmyre v. Raymond*, (12 Wend. 245;) *Spalding v. Congdon*, (18 Id. 543;) *Gurney v. Parks*, (1 How. Special Term Rep. 140.)

EDMONDS, J. The rule applied for cannot be granted. The only relief which could be granted would be to allow judgment to be entered in the name of the original parties. But that is a right conferred by statute, (2 R. S. 387, § 4,) and can only be exercised within *two* terms after plea of confession. This plea was put in last October; and more than two terms having passed, the court has no power in the matter.

Motion denied.

SAME TERM. Before the same Justice.

YOUNG *vs.* DE MOTT.

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82h 350 Where, from the nature of the action, the knowledge of the facts on which the plaintiff's claim rests is more with the defendant than with the plaintiff, the latter will not be required to furnish a bill of particulars, until he has obtained, or at least had an opportunity to obtain, a discovery from the defendant.

THE declaration in this case was special; alleging that the defendant had been employed by plaintiff to collect or compromise for him a certain claim, which he had settled, and had received in satisfaction sundry demands and assets, which he refused to give any account of, or to pay over. The defendant obtained an order for the plaintiff to furnish a bill of the particulars of the demands and assets which the declaration alleged he had thus received in settlement. The plaintiff moved to set aside the order, on two grounds. 1. Because, from the nature of the action, the knowledge was more with the defendant than with the plaintiff; and 2. Because he could not furnish a bill of particulars until he had obtained a discovery from the defendant.

EDMONDS, J. This is a case in which an adherence to mere technicality may prejudice the merits. The plaintiff brings his suit against the defendant for certain moneys and securities which the defendant has received for him, but which he refuses to render any account of, or to pay over. And the defendant, by asking for a bill of particulars, seeks to tie the plaintiff down in such a manner that if he makes a mistake, he may be turned out of court. This was manifest to the commissioner; and it was also shown to him that the plaintiff could not give a bill of particulars, with any safety, until the defendant should make a discovery of that which was peculiarly within his knowledge; that is, what moneys and securities of the plaintiff he had received. Under such circumstances, the defendant ought not to have been allowed to ask for particulars until he had made a discov-

McGaffigan v. Jenkins.

ery. But the plaintiff ought, in the meantime, to have taken steps to obtain a discovery. And he must do so with all convenient speed ; otherwise he may keep this suit hanging over the defendant *ad libitum*.

The order for a bill of particulars must be set aside ; without prejudice however to the defendant's right to apply for a new order for particulars, and proceeding to judgment thereon, unless the plaintiff, within twenty days, shall institute proceedings to obtain a discovery, and prosecute the same to a termination, with all due diligence.

SAME TERM. *Before the same Justice.*

McGAFFIGAN vs. JENKINS.

After a default has been regularly taken against a defendant, the same will not be opened, upon a mere general affidavit of merits. The party must disclose the nature of his defence ; so that the court may judge whether it is meritorious.

THIS was an action against the late sheriff of Kings county for not returning a *fi. fa.* An inquest was regularly taken at the last circuit in that county, and was set aside by an order of the late supreme court, dated June 8th, 1847, on the defendant's paying the costs of the inquest, and the subsequent costs ; but without costs of the motion, to either party. At the time of granting this order, the defendant's counsel was present, and was aware of it, and yet omitted to serve it, until July 7th ; and no offer was made by him to pay the costs. Judgment having been entered, on the 2d of July,

N. F. Waring, for the defendant, moved, on a general affidavit of merits, to have the benefit of the order made on the 8th of June.

Schanck v. Sniffin.

S. F. Clarkson, for the plaintiff.

EDMONDS, J. The plaintiff was regular in perfecting his judgment, and in disregarding the rule of the 8th of June. He had good reason, under the circumstances, to believe that the defendant did not intend to use it. On the merits, however, the defendant might be let in, if the court were satisfied that he had any. The suit is against him as sheriff, for neglect of duty in not returning an execution. He merely swears generally to merits, without specifying what they are. And as I doubt, under the circumstances, whether he has any meritorious defence, I cannot let him in; unless he discloses what that defence is, so that I may judge whether it is such an one as he ought to be allowed to set up.

Motion denied with costs; but without prejudice to the defendant's right to renew it, on papers disclosing the nature of his defence.

SAME TERM. *Before the same Justice.*

SCHANCK vs. SNIFFEN.

An injunction will not be granted to restrain a defendant in a creditor's suit from proceeding under the insolvent act, to obtain his discharge; unless special cause is shown for restraining him.

T. E. Tomlinson, for the defendant, moved to set aside, or to modify, an injunction granted on a creditor's bill, which injunction restrained the defendant from proceeding, under the insolvent law, to obtain a discharge. The bill merely stated the fact that the defendant had, prior to filing the bill, made his application under the insolvent law, and prayed that he might be restrained from proceeding on his application; but without stating any special reasons therefor.

In the matter of Craig.

EDMONDS, J. That clause ought not to be included in the injunction, unless special cause is shown therefor. It is not a matter of course thus to restrain a defendant, upon a mere suggestion of the fact that he is proceeding to obtain his discharge.

Injunction modified as to the clause objected to.

SAME TERM. *Before the same Justice.*

In the matter of CRAIG.

Where a trust is created, as to real estate, by the terms of which the trustee is to hold the land to the use of the *cestui que trust*, and to convey the same to such person as the latter shall appoint, the court will not, upon the death of the trustee, appoint a new one in his place.

P. J. Joachimssen, for a *cestui que trust* in a trust concerning real estate, moved upon petition, for the appointment of a trustee, in the place of one who had died. The petition set out that the trust was that the trustee should hold the land to the use of the *cestui que trust*, and to convey the same to such person as he should appoint.

EDMONDS, J. Under the 47th section of the article of the revised statutes which relates to uses and trusts, (1 R. S. 727,) the *cestui que trust*, being entitled to the actual possession of the land, and to the receipt of the rents and profits, he is to be deemed to have a legal estate therein, of the same quality and duration as his beneficial interest. It would, therefore, be improper for the court to interfere and grant this petition. For aught that appears, this trust may have been created for the purpose of enabling an alien to hold real estate, contrary to our statute.

Motion denied.

SAME TERM. *Before the same Justice.*

In the matter of the TRUSTEES OF THE VILLAGE OF WILLIAMSBURGH.

To deprive a party of his remedy by mandamus, on the ground that he has a remedy by action, the remedy by action must not only be adequate, but it must be specific. If the only specific remedy a party has is by mandamus, the court will not quash a writ of that nature, on the ground that an action of replevin would lie, or a suit for damages.

If the return to an alternative mandamus is evasive, a peremptory mandamus will be issued.

Officers before whom an assessment of the damages sustained by the opening of a street in a village is had, and whose duty it is to deliver the inquisition of the jury to the trustees of the village, cannot escape from the performance of that duty, by voluntarily parting with the control over the inquisition.

UNDER the provisions of the act to incorporate the village of Williamsburgh, a jury had been summoned by two magistrates to assess the damages sustained by the opening of a street. The jury found their verdict, reduced it to writing, and signed it, but refused to deliver it to the trustees of the village until they should pay them for their services. Upon the application of the trustees, an alternative mandamus was issued, directed to the justices and jury, commanding them to proceed and make return of their action in the premises. The justices returned that the inquisition of the jury, after being signed, was delivered to one of the jury to be handed to the trustees. One of the jurors returned that it had been delivered to the justices, but did not say whether it had been returned to the jury, or whether it was in their possession, or not. The other eleven jurors made no return to the mandamus.

N. F. Waring, in behalf of the jurors, moved to quash the mandamus; on the ground that the trustees had a remedy by an action of replevin against the particular juror, or by a suit against them all for damages.

In the matter of the Trustees of the Village of Williamsburgh.

EDMONDS, J. To deprive a party of his remedy by mandamus, on the ground that he has a remedy by action, the remedy by action must not only be adequate, but it must be specific. The action for damages certainly would not be specific. Whether a replevin would be, or not, depends upon circumstances. For if the inquisition could not be obtained, on the writ of replevin, then the only remedy of the trustees would be in the damages which they might recover. The only specific remedy they can have is by mandamus. Therefore the motion is denied.

H. H. Stuart, for the trustees, then moved to quash the return; and that a peremptory mandamus issue.

EDMONDS, J. So far as the justices are concerned, it was their duty, when the inquisition was returned to them, to deliver it over to the trustees, so that it could be available. And if they have parted with the control over it, it is their business now to recover possession of it, and complete their duty. So far as relates to the single juror who has made a return, his return is evasive in not stating whether the inquisition is now under his control, or not. And there is a conflict in matters of fact, between these two returns, which these parties must settle between themselves. The rights of the relators are not to be prejudiced by this conflict. The other eleven jurors upon whom the alternative writ was served have made no return at all.

Order that peremptory mandamus issue.

SAME TERM. *Before the same Justice.*

WARNER vs. GOUVERNEUR'S EXECUTORS.

Where a mortgagee has not provided for keeping down the accruing interest upon the mortgage, by securing a lien on the rents and profits, the court will interfere with the mortgagor's possession, prior to a decree of foreclosure, and appoint a receiver of the rents and profits, if the premises are an inadequate security for the debt secured by the mortgage, and the mortgagor, or other person in possession, who is personally liable for the debt, is insolvent.

But a receiver will not be appointed, upon a mere allegation that the mortgaged premises are not an adequate security for all just incumbrances thereon. The mortgagee applying for a receiver must allege, in his bill, that the premises are not an adequate security for the amount due to him.

The selling of a mortgage for less than its nominal amount, does not vitiate the security.

The hypothecation of an obligation valid in its concoction, as security for a usurious loan, will not render it void, or discharge the debtor from liability thereon. And upon the payment of the amount of the loan, the obligation will be free from all taint.

A claim for damages sustained in consequence of the breach of an agreement between a mortgagor and mortgagee that the former should release from the lien of the mortgage any parts of the mortgaged premises which the mortgagor might from time to time sell to others, cannot be offset against the amount due upon the mortgage.

Where an agreement of that nature, between mortgagor and mortgagee, did not specify the quantity of land to be released, nor the terms on which releases were to be given; *Held* that any violation of the agreement, by the mortgagee, would not lay the foundation for an equitable offset, unless it was shown that the refusal to give releases was unreasonable, or unconscionable.

IN EQUITY. Motion to dissolve injunction, and to appoint a receiver.

Warner purchased of the defendants' testator certain lands, for the consideration of \$48,093,75; \$15,000 of which was paid in cash, and two mortgages given for the balance; one for \$15,000, which was to be a first mortgage on the premises, and another for \$18,093,75, which was subsequently reduced by payments to something between \$6000 and \$7000.

Gouverneur, in his lifetime, assigned the first mortgage to the American Life and Trust Company, and guarantied its payment. After that mortgage became due, the company filed

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their bill to foreclose, against Warner and Gouverneur. They both answered ; Warner setting up as a defence that the title of the company was void by reason of usury, inasmuch as the company had paid Gouverneur in their own bonds, at five years, drawing a less interest than the mortgage ; which bonds were below par in market, and on a sale of which Gouverneur had realized less than \$14,000. Gouverneur, in his answer, did not set up the defence of usury, but stated that Warner had, in his answer, set up various matters which, if sustained, would bar the right of the company to recover in their suit, and also bar his right to recover against Warner, if he, as surety of Warner, should pay up the bond and mortgage to the company ; in regard to which he submitted himself to the judgment of the court. While that suit was pending Gouverneur died, and the company became insolvent and made a general assignment for the benefit of its creditors. After which Gouverneur's executors obtained a re-assignment of the mortgage, from the general assignee, and continued the foreclosure suit for their own benefit. They also commenced a statute foreclosure of the second mortgage ; having, in the mean time, become the owners of another mortgage on the same premises, and of a judgment against Warner. Warner filed his bill in this suit, in the nature of a cross-bill in the suit of the American Life and Trust Company, and praying for an injunction to stay the proceedings on the statute foreclosure. Before any of the proceedings for foreclosure were commenced, Warner failed, and made an assignment for the benefit of his creditors. His assignees allowed him to retain possession of the premises, on his agreeing to pay a rent of \$500, which was to be by him expended in improving the property.

C. Edwards, for the defendants, now moved to dissolve the injunction, and for the appointment of a receiver ; on the grounds that the whole of the first mortgage was unpaid, that a large balance of several thousand dollars, for principal, was due on the second mortgage, together with several years' arrears of interest on both mortgages ; that Warner was insolvent and

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continued in possession, and that the premises were a scanty security for the amount due.

Murray Hoffman, for the plaintiff, objected 1. To the appointment of a receiver; because it did not appear that the premises were an inadequate security for the mortgages which the defendants were seeking to foreclose. The only allegation being that they were inadequate to pay all the incumbrances which the defendants held on the premises, including a subsequent mortgage and judgment for about \$11,000. He cited, for the rule governing such cases, *Bank of Ogdensburgh v. Arnold*, (5 Paige, 39;) *Shotwell v. Smith*, (3 Edw. 588;) *Sea Ins. Co. v. Stebbins*, (8 Paige, 566.) 2. To the dissolution of the injunction; because, as to the first mortgage, Gouverneur stood in the relation of surety for Warner to the Life and Trust Company. That company had no right to recover, by reason of their illegal title to the mortgage; and the defendants, by repossessing themselves of that mortgage, were to be regarded as either standing in their shoes and subject to their disabilities, or as having, by their interference, deprived their principal debtor of a valid defence in that suit. (*Burge on Surety*, 367, 8. *Batchelor v. Priest*, 12 Pick. 399. *Randolph v. Randolph*, 1 Rand. Rep. 490. *Theob. on Prin. and Surety*. 3.) And because there was an agreement between Warner and Gouverneur, at the time of the first contract of sale, that Gouverneur should release from the lien of his mortgages any parts of the premises which Warner might from time to time undersell; which agreement Gouverneur had refused to perform, whereby Warner had sustained great losses which he claims to offset against the balance due on the mortgages.

C. Edwards, in reply, insisted that the agreement to give releases, not being contained either in the deed or the mortgage, but resting only in parol, was void by the statute of frauds.

EDMONDS, J. The rule in these cases, where the mortgagee has not taken care to keep down the accruing interest, by se-

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curing a lien on the rents and profits, is to interfere with the mortgagor's possession prior to a decree of foreclosure, and appoint a receiver of the rents and profits, when the premises are an inadequate security for the debt secured by the mortgage, and the mortgagor or other person in possession who is personally liable for the debt is not of sufficient ability to answer for the deficiency.

In this case there seems to be no doubt of the mortgagor's insolvency, but there does seem to be a good deal of doubt as to the inadequacy of the security of the mortgaged premises. The allegation is that they are not an adequate security for "all just incumbrances" on them. All of the just incumbrances, it would seem amount to near \$70,000; while the claim of the defendants is not more than half that sum. And while the defendants do not say whether the premises are, or are not, adequate security for the amount due to them, the mortgagor on the other hand avers that they are sufficient for that amount. There is therefore no ground for the appointment of a receiver.

The motion to dissolve the injunction rests on different grounds.

The first ground taken, it seems to me, cannot be tenable. If the transaction between Gouverneur and the Life and Trust Company was an absolute sale of the mortgage, surely the fact that its owner chose to sell it for less than its nominal amount, did not vitiate the security.

But if it was a loan, and usurious in its character, so far as to vitiate the title of the Life and Trust Company, as soon as the loan was discharged the taint would be removed, and the mortgagor would cease to have any thing to complain of. I am not aware that the prohibitions against usury have ever been carried so far as to determine that an obligation untainted in its concoction, is rendered void and the debtor discharged from all liability upon it, by the simple fact that the holder had hypothecated it as security for a usurious loan. Nor can I recur to any principle that will sustain such a position. That which was invoked in behalf of Mr. Warner will not answer the purpose. The relation of principal and surety does not in fact exist be-

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tween Warner and Gouverneur's executors. As between them, he is the debtor and they the creditors. It is only between them on the one side and the Life and Trust Company on the other, that the relation of principal and surety may be supposed to exist. When this bill was filed that company had ceased to have any interest in the mortgage. Even the quasi relation of principal and surety had ceased to exist; and the parties had returned to their original position of debtor and creditor in a contract uncontaminated by any illegal consideration. It is therefore unnecessary to inquire whether the transaction between Gouverneur and the Life and Trust Company was usurious or not, or if usurious, what the effect would be upon the rights or obligations of the mortgagor. It is enough to know that the contract which the executors are seeking to enforce is, itself, untainted with any illegality, and is held by them by a title equally uncontaminated. For if they take as purchasers from the company, it was not illegal to buy or sell the security below par; and if they retake as borrowers who have paid up the loan, they have removed all taint, and are restored to their original rights as against the mortgagor.

The other ground on which our interference is sought is equally free from difficulty.

The equity of the bill in this respect consists in this, that at the time of the sale from Gouverneur to Warner it was understood that Warner's object was to resell the premises in small parcels, and that on such resales he was to have releases from Gouverneur's liens; that Warner made resales, or contracts to sell, to sundry persons, and demanded releases, which were refused to him; whereby he lost those sales and sustained losses, which he claims to be equitable offsets to the claim under the mortgage.

The answer denies that there was ever any contract to give releases, but insists there was only a willingness by Gouverneur to give them, not as matters of right but of favor; it denies also that any contracts of resale by Warner were defeated by the refusal of Gouverneur to give releases, and consequently that

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Warner sustained any loss thereby. Thus is denied, in point of fact, two material elements of the equity of the bill.

It is also insisted, that as it is no where pretended that the agreement to give releases specified the quantity to be released, or the terms on which releases were to be given, any violation of the agreement would not lay the foundation for an equitable offset unless it was first shown that the refusal to give releases was unreasonable or unconscionable; which is not done in this case.

Again, it is averred that no releases were ever asked for until after the whole sum secured by the mortgages had become due, after Warner had made a general assignment for the benefit of his creditors, after a large arrear of interest had accrued, after Warner had failed to perform his agreement as to the cash payments on the premises, leaving a large amount due thereon, and after he had incumbered the premises by giving a mortgage to his mother in law and allowing judgments to be obtained against him by others. And it is with great propriety insisted that it would be inequitable to allow Warner, under such circumstances, a right to demand that any uncertain portion of the premises should be released from the lien, upon indefinite and unascertained conditions.

I am not pretending to say how this case may appear on the final hearing, and after the testimony shall all be in. I am deciding it upon the papers before me on this motion: and I cannot resist the conclusion that too many of the elements essential to the equity of the bill are denied by the answer to warrant me in retaining the injunction. It must therefore be dissolved.

SAME TERM. *Before the same Justice.*

FERUSSAC and wife *vs.* THORN and wife.

Where a bill is filed to enforce the performance of a written contract, and the defendant sets up the defence that the contract sought to be enforced is different from that agreed upon between the parties, he must, in order to sustain that defence, show that the spurious was substituted for the real contract, through mistake, or fraud.

After a final decree has been regularly entered, against a defendant, by default, for want of an answer, the court will not set the same aside, as a matter of course, merely upon the defendant's presenting a sworn answer, setting up a defence to the suit.

The defendant must show that there is a probability that if the decree is opened he will be able to establish his defence, by proof. And if the court is satisfied, from the answer itself, that it is impossible for the defendant to prove the circumstances relied upon in his defence, by any competent testimony, it will not disturb the decree.

IN EQUITY. The daughter of the defendants was married to the plaintiff, the Baron de Ferussac, in Paris, on the 26th of August, 1845. Prior to the solemnization of the marriage, an antenuptial contract was entered into, whereby the defendants settled on the plaintiffs 20,000 francs a year, payable quarterly in advance from the day of the marriage. And it was agreed that a legacy of £5000 sterling, which was payable to the daughter on her attaining the age of 21, should be a part of the marriage portion; and after its payment to the baron, an interest thereon at the rate of 7 per cent a year should be deducted from the 20,000 francs, and the balance only be thenceforth paid, with a covenant that that balance should be at least 12,000 francs a year. The legacy of £5000 had been deposited in the Life and Trust Company, for accumulation. In February, 1846, Madame Ferussac became of age, and all the parties had then returned to this country. The first quarter of the annuity, 5000 francs, was paid on the day of the marriage, and the second quarter in November following, after the arrival of the parties in America. After Madame Ferussac had attained the age of 21, the defendants refused to make any

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more payments, and notified the Life and Trust Company not to pay over the legacy, and refused to secure the annuity by mortgage on their property in New-York as had been stipulated in the antenuptial contract.

The plaintiffs filed their bill, making the Life and Trust Company parties, to compel a specific performance of the contract, and the payment over to them of the £5000 and its accumulations.

On an order of reference to a master, a commission was executed in Paris, and the depositions of the notary who drew and witnessed the contract, and of others who were present at the time of its execution, were taken, to be read on that reference. Upon the coming in of the master's report, an order was entered, directing the £5000 to be paid to the plaintiffs, which was accordingly done.

The bill of complaint was served on the 24th of September, 1846, and the time to answer was extended, at various times, by consent; and with a mutual understanding that no default should be taken without timely notice to put in an answer. The object of the delay being to effect a settlement, the answer of the defendants was drawn up and submitted to the inspection of the other party. On the 25th of May, 1847, the solicitor for the plaintiffs wrote to the solicitor for the defendants that every effort to arrange the controversy having failed, he would be required to put in the answer on the following day. The answer not being put in, on the 3d of June the bill was taken as confessed. A motion was now made to set aside the default, and to let the defendants in, to answer.

The answer, and the depositions taken in Paris, were among the papers used on this motion.

The defence set up was that the agreement between Mr. Thorn and the Baron de Ferussac, was that the legacy of £5000, and the annuity, should be settled on Madame Ferussac to her separate use, while the contract as executed subjected the property to "the rules of the *communauté* with all its consequences, and especially the administration of the property of the wife by the husband; which gave to the husband the right

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to receive the principal, but the wife or her heirs to have the right, on the dissolution of the *communauté*, to take back all that had belonged to her."

Murray Hoffman, for the defendants, insisted that there were two particulars in which the contract, as executed, differed from the agreement of the parties; viz. as to the legacy, and as to the annuity. That to deny this motion would be to decide the merits of the controversy in this form. He cited *Wells v. Cruger*, (5 *Paige*, 164;) 2 *Story's Eq.* § 770.

E. Sandford, for the plaintiffs. 1. The defence set up has already been adjudicated upon. An application to open this default having been made to the chancellor, and denied by him, upon the merits, it cannot be renewed in this court. (*Voorhees v. Bank of the United States*, 10 *Peters*, 449. *La Guen v. Gouverneur*, 1 *John. Ca.* 437.) 2. There is no defence in fact which could be made out by proof, if the default were opened.

EDMONDS, J. A final decree having been entered, on the bill taken as confessed in this suit, the case is precisely within the rule laid down in *Wells v. Cruger*, (5 *Paige*, 164;) and the answer of the defendants was required to be exhibited in order that I might be satisfied as to the nature of the defence, and the sufficiency of the answer.

The nature of the defence is that the contract sought to be enforced is different from that agreed upon between the parties in the first instance. To make that available, it must also appear that the spurious was substituted for the real contract, through mistake or fraud. There are then two elements necessary to this defence; and if either fails, the defence is unavailing. To make out the latter element, the defendants set up that the contract was written in a foreign language, with which it is true they were familiar, so far as respects its use in common conversation, but not familiar with the technical terms used: that it was read to them hurriedly, and when on the eve of the marriage, so that their attention was not drawn to the

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particular language in which it was clothed : and that their signatures were "procured to it by misrepresentation or wilful concealment of the real contents, and it was executed by them under a mistake as to its contents, produced thereby."

The defendants invoke to their aid a memorandum in writing which they aver was drawn up, as a minute of their agreement for the instruction of the notary, and in which it was said that the annuity should be for the daughter's separate use and receipt, and the legacy should be invested in her separate or individual name. They also aver that this agreement was varied in these respects; that the annuity should continue only during the lifetime of the father, and not during that of the daughter, and that the defendant, in lieu thereof, should agree by his will to leave to her an equal share of his estate with his other children. And that the proposition to secure the annuity by a mortgage on defendant's property in the United States, was declined by him, and withdrawn. According, then, to the answer, the agreement was that the legacy should be secured to the daughter's separate use—that the annuity should be paid to her separate use, and continue only during the lifetime of her father, and not be secured except by the promise contained in the contract. And yet the contract which was executed, in language remarkably perspicuous and exempt from technicalities, provides quite otherwise. Article 1, of the contract, is entitled "Community," and provides that "the intended married couple adopt as the regulation of their marriage the rules of the community of property as it is established by the civil code, with the modifications hereinafter described." Art. 2, entitled "Exclusion of the movables present and future," declares that the movables of the married couple are entirely independent of the community. Art. 4, is entitled "Contribution of the intended husband." Art. 5, entitled "Contribution of the intended wife," declares that she brings into the marriage, 1st, her movables, &c. valued at 20,000 fr.; 2d, the legacy of £5000, "of which contribution the husband had notice, and consented to be charged therewith, viz. : with the movables, &c., from the fact of the marriage, and with the

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legacy, "as soon as he shall have reduced the same into his possession." Art. 6, entitled "Appointment of marriage portion by Mr. and Mrs. Thorn," declares that they give their daughter, as a marriage portion—which is to be an advance on her inheritance—"a yearly and perpetual income of 20,000 fr., being the interest, at 7 per cent, of 285,715 fr." and then provides, "in order to secure to the intended married couple both the use and the payment, if it should be necessary, of the income of 20,000 fr., Mr. and Mrs. T. bind themselves jointly and severally to give a good and sufficient mortgage on the real estate belonging to one of them, situated in the United States, to the amount of the principal sum of 285,715 fr." &c. The contract then provides for the dissolution of the community—that if the capital out of which the annuity flows shall be paid in, Mr. and Mrs. T., or the daughter's heirs, may retake it, within a period therein specified—and in case of the daughter's death, before the capital is paid in, M. de Ferussac shall receive the annuity of 12,000 fr. for two years after her death. "Mr. and Mrs. T. and the intended wife make a gift to the future husband, who accepts it, but only in case of his surviving his intended wife, of the said income of 12,000 fr., which Mr. and Mrs. T. bind themselves in that case to pay to the intended husband during the two years which shall follow the decease of the future wife."

The contract that was executed being thus so essentially different from that set up by the defendants, the nature of the task which they seek to assume in interposing their defence, may be estimated. By what testimony is it to be sustained? Not by M. de Ferussac, for this is not an application for leave to file a cross-bill by way of a discovery from him. Not by the notary, for he has already testified, and has given a very different relation of the transaction. By any one of the persons who were present at the execution of the contract? Those residing in Paris have already been examined, and do not sustain the defence. On the other hand, they, or some of them, say, that at the time of the execution, the contract was read by the notary, not hastily, but in a loud and distinct tone of voice,

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that Mr. T. followed the reading, on a copy of it which he held in his hand, and which had been for several days in his possession; that he made no objection to any of its provisions: that it conformed very closely to the antenuptial contract of his other daughter: that two or three days before the marriage, the notary had waited upon Mr. T. at his house, and had read over to him the draft, the contents of which he was already aware of, and in answer to his questions had stated to him, among other things, "that at all times the intended husband shall have a right to receive the capital sums which shall be paid to his wife, and especially the £5000, and to employ it in such manner as he shall think fit, but as soon as he shall have received them he shall become a debtor therefor to his wife," &c.

Under such circumstances, to get rid of a final decree, the defendants must do something more than merely present a sworn answer. They must show that there is a probability that they will be able to establish their defence: otherwise opening the decree would be merely leading to protracted and unavailing litigation, with no prospect of changing the result.

These considerations have the more force with me from these circumstances: 1. That the defendants in their answer say that "their signatures to the contract were procured by misrepresentation or wilful concealment." Do they not yet know which? Are they not only destitute of proof, to establish that, but even wanting in evidence enough to bring their own minds to a conclusion? Then indeed would farther litigation be unavailing. 2. Throughout the whole proceedings the defendants have held out the idea that the contract was executed under circumstances of haste and excitement, which precluded a deliberate consideration and consequent knowledge of its contents. Before the answer, which they seek to put in, was sworn to, the deposition of the notary had been received in this country, and its contents had come to their knowledge; yet the answer takes no notice of the facts stated by the notary, that he had had one or two interviews with Mr. T. in regard to the contract, had read the draft to him, and had explained to him that

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its effect and operation would be precisely such as the defendants now complain of. If those statements are true, there is an end to this defence; and it could hardly be right to admit an answer which maintains a studied silence in regard to them.

Under these circumstances, until such allegations shall be met in some form, and until the court can be satisfied that there is some probability of making out the defence against the strong countervailing evidence before me, I cannot feel warranted in opening the decree.

Edmonds?

SAME TERM. *Before the same Justice.*

WILLIAMS vs. WHEELER.

The practice of docketing judgments before the records have been signed by the clerk, is erroneous, and will not be sanctioned by the court.

Where a judgment was recovered upon a bond and warrant of attorney, and at the time the judgment record was left at the clerk's office, to be docketed, the attorney omitted to leave the warrant of attorney, but left it the next day, in the office; from which place it was taken away by another person, through mistake, and lost, and the clerk docketed the judgment without having previously signed the record; *Held* that these were errors which the court had power to remedy, by permitting an amendment of the record.

The section of the revised statutes which declares that no judgment shall be deemed valid, so as to authorize any proceedings thereon, until the record shall be signed and filed, and the sections respecting amendments, having been passed at the same time, are to be regarded as *in pari materia*; and they do not conflict with the power of the court to permit an amendment, under the latter sections, even in a case where, under the former, the proceeding would, without an amendment, be invalid.

In this case, *P. Reynolds*, for the defendant, moved to set aside a judgment entered on bond and warrant of attorney, and an execution issued thereon, on two grounds; 1st, fraud in obtaining it; and 2d, irregularity in entering it. The allegation of fraud was fully met by the counter affidavits, and was aban-

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doned on the argument. The irregularity consisted in this : that when the attorney left the record, on the 17th of August, at the clerk's office, he omitted to leave the warrant of attorney, but left it the next day, in the office, from which it was taken away, by mistake, by an attorney in no way connected with the case, who lost it. When the attorney left his record, the clerk was not present to sign it, and the deputy, by mistake, put it away among records to be docketed, instead of among those to be signed, and it was accordingly docketed without being signed. On the 23d of August, the clerk, discovering his omission, signed the record as of the 17th. Among the affidavits was one by the late clerk of the supreme court in New-York, stating that his practice had been to allow records left at his office in his absence to be docketed, before he signed them ; and to tax the costs and sign the records at his convenience.

S. M. Woodruff, for the plaintiff, insisted that the judgment record having been filed and docketed on the 17th of August, and subsequently signed by the clerk as of the 17th, the judgment was regularly perfected as of that day. And that the execution was regularly issued ; the warrant of attorney expressly authorizing the immediate issuing of an execution. That the judgment could not be impeached for, or affected by, any error of the clerk, or of a stranger, without the order of the court. But that if there was any error, the court had ample power to permit an amendment, under the statute respecting amendments. (2 R. S. 424.) And that this was a case where the error, if any, was one of form merely, arising from the default, or negligence, of an officer of the court, by which the defendant was not prejudiced, and where an amendment would be clearly equitable, and in furtherance of justice.

EDMONDS, J. In this case, the defendant being indebted to the plaintiff in some three or four thousand dollars, upon the promise of giving security by bond and warrant of attorney for that debt, obtained from his creditor \$600 more ; and after

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deliberating as to the nature of the security, he, with a perfect understanding of what he was about, executed the bond and warrant of attorney, authorizing a judgment to be entered against him, and an execution to be forthwith issued thereon. Having thus secured to himself all the benefits that could be derived from the arrangement, he now asks, because of some errors or mistakes in point of practice, in carrying out the arrangement, to deprive his creditor of the promised security. And I am told, on the argument, that he does not ask this as a favor, but demands it as a matter of strict right.

It becomes me, then, well to consider whether the rules of practice are so strict and inflexible as to compel me to disregard that which it is most manifest is the substantial justice of the case; and whether the errors of the officers of the court in carrying into effect the agreement of the parties, errors which the creditor could not control or guard against, shall be allowed to operate to the destruction of that agreement—to deprive the creditor of all opportunity to obtain payment of his just claim, and virtually to discharge the debtor from his obligation.

The practice which, it is said, has long prevailed in the office of the clerk, and out of which the difficulty in this case has sprung, is unquestionably erroneous, and very hazardous. It may be a matter of convenience to the clerk to permit records to accumulate in his office until it shall become convenient for him to sign them, and in the meantime to allow the parties to have all the benefit of them, the same as if he had done his duty; but it is in violation of law, and cannot be sanctioned. That, however, is a matter which the parties cannot control, nor can they be aware of it, unless they follow the clerk and his deputies around from desk to desk to watch whether they do their duty. They cannot, therefore, justly be held responsible for every omission or error on the part of the clerk. Other parties may be innocently misled by some such error or omission, and rights may become vested, and thus the act of the officer, though erroneous, become binding and conclusive. But there is no such element in this case. This is simply a question between the debtor and the creditor, whether the former shall be released

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from his obligation, and the latter be deprived of the security for his just claim, by the mistake or error of the officers of the court.

One of the wisest and most beneficent parts of our law, is the statute which confers on our courts the power of amendment ; and the courts have been continually becoming more and more liberal in carrying its provisions into effect, where the rights of innocent third parties are not affected.

Before judgment, they may amend any process, pleading, or proceeding, in form or in substance, in furtherance of justice. (2 R. S. 424, § 1.) After judgment, any defects or imperfections in matter of form may be rectified or amended in affirmance of the judgment. (*Id.* § 4.) And any omission, imperfection or defect, owing to any informality in entering a judgment, or to any default or negligence of any clerk or officer of the court, or of the parties or their counsellors or attorneys, by which neither party shall be prejudiced, and not being against the right and justice of the matter, may be amended at any time. And it is expressly declared that no judgment by confession, &c. shall be reversed, impaired, or in any way affected by reason thereof. (*Id.* §§ 7, 8.)

In this case the difficulty arose from the mistake of the clerk in handing over the record to be docketed before it was signed, and thus forgetting for several days that it had not been signed, and from the negligence of the attorney in omitting to leave with the clerk the warrant of attorney at the time he left the record, and when afterwards he did leave it, from the accident of another attorney's carrying off that paper from the clerk's table. Will it be "furthering justice" or conforming to the "right and justice of the matter," for this court to destroy the agreement between these parties and vacate the judgment, for this cause? I do not so understand our duty. Nor have our courts been characterized by such rigid practice. In *Lee v. Curtiss*, (17 *John. Rep.* 86,) the record was altered by striking out a verdict and substituting a nonsuit, so as to accord with the truth of the case. In *Seaman v. Drake*, (1 *Caines*, 9,) the omission to sign the record was held not to prejudice either parties or strangers, and the record was allowed to be amended.

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So in *Close v. Gillespie*, (3 *John. Rep.* 526,) where the cognovit was not signed, and there was in fact no confession on the record. So in case of a mistake in the name of the party for whom judgment was rendered. (*March v. Berry*, 7 *Cowen*, 344.) Judgment has also been amended by striking out the name of one of the defendants, (*Hanmer v. McConnell*, 2 *Ham.* 32;) by making it conform to a recognizance, (*State v. Cherry*, 2 *Dev.* 550;) by inserting costs, (*O'Driscoll v. McBurney*, 2 *Nev. & Man.* 59;) by inserting the recovery below, (*Lowry v. Catlin*, 2 *Verm.* 365;) where judgment was entered on the wrong count, and that after ten years had elapsed, (*Chamberlin v. Crane*, 4 *N. Hamp.* 115;) by adding a defendant, (*Bank of Newburgh v. Seymour*, 14 *John.* 219;) by correcting the amount of the judgment, even after satisfaction piece filed, (*Mechanics' Bank v. Minthorne*, 19 *John.* 244; *S. P. Patton v. Massey*, 2 *Hill*, 475; *Dewey v. Ten Eyck*, 2 *Penn.* 1023; *Commonwealth v. Winstons*, 5 *Rand.* 546.) And many of these amendments were permitted even after error brought. (*Cheetham v. Tillotson*, 4 *John.* 499. *Hubert v. Hardenburgh*, 5 *Halst.* 222. *Bank of Kentucky v. Ashley*, 2 *Pet.* 329. *Prevost v. Nichols*, 4 *Ycates*, 479.)

But it is useless to multiply authorities; enough have been referred to, to show the principles which have governed our courts on the subject of amendments, and which will govern this court.

But it is insisted that the revised statutes contain a new enactment, passed since many of these decisions, and altering the law. Thus § 11, (2 *R. S.* 360,) which defines the duty of the clerk to mark on the record the time of filing it, contains this in addition, "no judgment shall be deemed valid so as to authorize any proceedings thereon until the record shall be signed and filed." And it is urged that this judgment not having been in fact signed till after the execution issued, though by mistake or negligence of the clerk, the execution on it was void. This provision sprung out of the decision of this court in *Barrie v. Dana*, (20 *John.* 307,) where it was contended that it was not necessary, under the statute, to have the record actually filed

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before taking out execution ; in analogy to the English practice which authorized an execution to be issued as soon as the judgment was signed. This court said, however, that it had been their invariable practice to require the record to be filed, as well as signed, before execution ; and the whole object of the statute evidently was, perhaps unnecessarily, to settle the question and establish the practice.

This statute, and that respecting amendments, were passed at the same time, are to be regarded as *in pari materia*, and do not conflict with the power of the court to allow an amendment under the latter, even in a case where under the former, the proceeding would, without an amendment, be invalid. And the propriety of allowing the amendment is manifest when thus the right and justice of the matter will be attained and nothing disturbed except that which was intended merely as a regulation of practice.

It will be proper then to allow an amendment of the record by which it shall be signed as of the 17th of August, and to permit the warrant of attorney to be filed as of that time. And I allow it without costs, because it was inequitable for the defendant to seek to get rid of the judgment against him, under the circumstances of this case.

SAME TERM. *Before the same Justice.*

WETMORE vs. JENNYS.

A defendant is entitled to a bill of particulars of the plaintiff's demand, upon counts in special assumpsit, as well as upon the common money counts.

A bill of particulars in these words, "to the first special count, damages \$5000," and the same as to each of the other special counts in the declaration, is insufficient.

So of a bill giving the following specification of the plaintiff's claim upon the money counts, "balance due on settlement, &c. \$5000."

So of a bill containing this particular as to the money counts: "money received at New-Orleans on account of plaintiff, \$5000," without specifying any date.

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BILL of particulars. The first count of the declaration alleges that the defendant was acting as agent for the plaintiff in the collection of a large claim, and that by the defendant's negligence &c. he was hindered in the collection of said claim. The second count charges that the defendant was the plaintiff's attorney to collect certain claims, and that through his negligence the plaintiff was subjected to great damage. The third count sets forth that the plaintiff was possessed of certain rights of action &c., and employed the defendant to prosecute them, and that the latter was guilty of negligence. After these three special counts, the common money counts followed. The defendant having obtained an order from a judge for a bill of particulars, the following bill of particulars was furnished by the plaintiff: "To the first special count damages \$5000;" and to each of the other special counts the same specification was given. To the common money counts the following particular was given: "balance due on settlement &c., \$5000." The defendant thereupon applied to a judge, who granted an order requiring a more specific bill, with dates and items. The particulars to the special counts furnished under this second order were the same as before. To the common counts this particular was given: "money received at New-Orleans on account of plaintiff, \$5000." There was no date whatever to any item.

F. E. Mather, for the defendant, moved for judgment of *non pros.* on account of the insufficiency of the bills of particulars. He cited *Stanley v. Millard*, (4 *Hill*, 50.)

J. A. Millard, for the plaintiff. The defendant, in an action of special assumpsit, has no right to call for a bill of particulars. (1 *Burrill's Pr.* 430. *Gra. Prac.* 510.) It is reasonable that it should be so. It is to be presumed that a declaration in special assumpsit is sufficiently specific. If it is not, the defendant's remedy is to demur. As respects the common counts, the bills furnished were sufficient, and they were a substantial compliance with the judge's order. The plaintiff's attorney

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did offer a third bill, more particular as to items and dates, but it was declined, as being insufficient and irregular.

EDMONDS, J. All the bills of particulars furnished or offered in this case were defective. The defendant had a right, on the special as well as on the common counts, to a bill of the particular demands claimed of him. And the orders of the judge were sufficiently explicit to apprise him of what was required, yet he three times persisted in giving merely a general statement of the damages he claimed. This was a mere evasion of the order, and justified the defendant in coming here for relief. He ought not to be required again to go to the judge, when his going there had been twice unavailing. The motion must therefore be granted, unless the plaintiff, in ten days, furnishes a bill of particulars of the several demands which are mentioned in the three first counts of the declaration. And this is a proper case to grant the motion, with costs; because the plaintiff, by evading the judge's order, has denied the defendant that to which he had a right, and compelled him to come here for relief.

SAME TERM. *Before the same Justice.*

SCUDDER and others vs. VOORHIS.

If the plaintiff amends his bill, by adding new parties, after the defendant's default for want of an appearance has been entered, he thereby waives the default.

IN EQUITY. Motion to set aside an order taking bill as confessed against the defendant Abraham Voorhis for want of appearance. It was shown that the plaintiffs, after taking the bill *pro confesso*, had amended their bill by adding defendants; without having taken out any new subpoena. After the default, on the original subpoena, was entered, the defendant Voorhis

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entered an appearance and asked the plaintiff's solicitor to waive the order *pro confesso*; which was refused.

C. Edwards, for the defendant Voorhis, referred to 1 *Dan. Ch. Pr.* 519.

R. Manning, for the plaintiff.

EDMONDS, J. The motion is granted. The plaintiffs, by amending their bill, waived the default. This must be so, or the case might assume this anomaly: that the defendant's default might be taken on the original bill, and his answer be received on the bill as amended.(a)

(a) In *The Bank of Utica v. Finch and others*, (1 *Barb. Ch. Rep.* 75,) the chancellor decided that where an original bill is taken as confessed, and an amended bill is subsequently filed, making other persons parties, the order *pro confesso* is thereby opened. By the English practice a new subpoena is issued upon filing an amended bill, requiring the defendant to appear and answer the same. But here no new subpoena is necessary, except to bring in new defendants who are made parties by the amendment. (*Lawrence v. Bolton*, 3 *Paige*, 294.) In *Cowman v. Lovett*, (10 *Paige*, 561,) the chancellor says the practice does not appear to be settled as to the necessity of a new order to answer the amended bill where the amendments are made before any answer, plea or demurrer to the original bill has been filed. He was inclined to think, however, that the proper practice in such cases is to enter a new order to answer the bill as amended; giving the same time to answer which the defendant originally had, in conformity to the provisions on that subject contained in the 45th rule of the court of chancery. And he held that a notice of such order to answer the bill as amended should be served on the defendant's solicitor.

There does not appear to be any reported decision defining the practice upon an amended bill, where the defendant has not appeared to the original bill. Under the former rules of the court of chancery, where the subpoena was personally served, if the defendant did not appear, the complainant entered an order that the defendant appear and answer the bill within the time prescribed by the rule, or that the bill be taken as confessed. And where the bill was amended, the complainant entered a similar order for him to appear and answer the amended bill. But as the 23d rule of the court of chancery as adopted in 1837, and the 13th rule of the new supreme court, in equity, allow the bill to be taken as confessed, for want of appearance, without any previous order to appear and answer, the proper course seems to be for the complainant, after the bill is amended, to wait the twenty days allowed to the defendant for appearing, and if he does not enter his appearance within that time, then to file an affidavit of the fact, and enter an order to take the amended bill as confessed for want of an appearance.

SAME TERM. *Before the same Justice.*

MICKLETHWAITE vs. RHODES and others.

Where the plaintiff, within five days after the time for replying had elapsed, served a replication upon the defendant, who refused to receive the same, in a case where the bill and the answer had both been sworn to, and they differed from each other very materially; and the delay in serving the replication had been accounted for; *Held* that it was a case in which a replication was necessary, to enable the court to ascertain the facts; and leave to file the same was granted.

The rules of the court ought not to be used for purposes of oppression, or in order to bring about a determination of the case upon technicalities, at the expense of the substantial merits.

IN EQUITY. *Charles Edwards*, for the plaintiff, on an affidavit showing that within five days after the time for replying had elapsed, he had served a replication upon the defendant's solicitor, who refused to receive it—now moved for leave to file a replication.

H. W. Griffith, for the defendant, insisted that it was not a matter of course to permit the filing of a replication, after the time limited by the rules of the court had expired. The court must be satisfied that the plaintiff will probably be injured if he is not allowed to file a replication. He cited *The Sea Ins. Co. v. Day*, (9 *Paige*, 247.)

EDMONDS, J. The case of *The Sea Ins. Co. v. Day* was one where the plaintiffs had been guilty of very gross negligence; thirteen months having gone by before an application to file a replication was made. In the present case there has been no unreasonable delay; and what delay there was has been accounted for. And the suit having been commenced in good faith, the defendant should not seek, by a mere technicality, to deprive the plaintiff of the opportunity to establish the justice of his claim, by proof. The bill having been sworn to, and the answer being also put in under oath, and they differing very materially from each other, it is necessary a replication should be filed, to enable the court to ascertain the facts. The

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rules which fix the time within which various acts are to be done during the progress of a cause were framed with a view of facilitating that progress, and ought not to be used for purposes of oppression; or in order to bring about a determination of the case upon technicalities, at the expense of the substantial merits. In this case the replication ought to have been received, when it was tendered. And there was no sufficient reason for driving the plaintiff to a motion. The motion must therefore be granted, without costs.

SAME TERM. *Before the same Justice.*

SELDEN vs. VERMILYEA and others.

A general power in trust is where an authority is given to the grantee to do some act, in relation to lands, which the grantor might himself lawfully perform; and where he is authorized to alienate the lands in fee, by means of a conveyance to any alienee whatever; and where some persons, other than the grantees of the power, are designated as entitled to the proceeds, or other benefits, to result from the alienation according to the power.

A power is irrevocable if no authority to revoke it is reserved or granted in the instrument creating it. And it is imperative if its execution is not made expressly to depend upon the will of the grantee, and if it imposes on the grantees a duty, the performance of which may be compelled in equity, for the benefit of the parties interested.

A court of equity will not interfere, by injunction, to prevent the execution of a power imposing a duty the performance of which it is the province of the court to enforce; unless the power has been inequitably or unconscionably executed.

A trust to sell lands, and divide the proceeds among the *cestuis que trust*, as beneficiary owners, and not as creditors, is void as a trust, but is valid as a power in trust.

Where a power to sell real estate is founded upon a valuable consideration, such as the surrender, by one or more of the owners, of a preference which they have obtained, and no power of revocation has been reserved, the power to sell is irrevocable, and imperative.

IN EQUITY. B. W. Rogers, being the owner of certain shares in the Apalachicola Land Company, of certain lands in Living-

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ston county, and of an interest in the Seneca Reservation, in order to borrow money of the Farmers Loan and Trust Company, conveyed to that company the lands in Livingston county, and took back from them a declaration of trust, stating that they held the same as security for the loan, &c.

Rogers was also indebted to the plaintiff, and to the defendant Vermilyea, in the sum of \$40,023,98 each; to secure which debts he executed sundry bonds and notes, and a conveyance to Noyes & Ogden, as trustees, of all the premises above mentioned, (the Livingston county lands subject to the lien of the Farmers Loan and Trust Company, and the Seneca Reservation subject to another trust,) in trust to receive conveyances, manage and improve, sell and dispose of the premises, in such parcels, at such times, and on such terms, as the said trustees should think beneficial, and to apply the moneys, &c. received by them, in payment of such of the bonds and notes of Rogers as should be due and remain unpaid—and whenever any of the notes and bonds should remain unpaid thirty days after falling due, then the trustees, upon the request of either Selden or Vermilyea, should sell in New-York after ten days' notice, so much of the Apalachicola Land Company shares as should be necessary to pay the bonds or notes in regard to which such request should be made. And if those shares should be inadequate to that end, then the trustees should, after six weeks' notice, sell in New-York, so much of the other trust premises as might be necessary to make up the deficiency; and when all the notes and bonds should be paid, then the remainder of the trust premises were to be reconveyed to Rogers.

By subsequent arrangements between all the parties, the lien of the Farmers Loan and Trust Company was extinguished, the residuary interest of Rogers was released to the trustees, and Rogers discharged from all personal liability on his bonds and notes; the trust fund being accepted as satisfaction of his indebtedness. By the agreement then made it was stipulated that for the purpose of avoiding a forced sale, arrangements should be made for the disposition of the whole trust property, and that the same should be offered for sale by the trustees

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(unless an amicable division without sale should be sooner agreed upon,) without delay, upon a reasonable advertisement, and under such conditions as would conduce to bring about a sale to the greatest advantage.

At the time of filing the bill, Selden continued to be the owner of all his bonds and notes, but Vermilyea had assigned several of his, to some of the other defendants, three of whom had, prior to the last agreement, notified the trustees that their bonds being over due they must proceed to sell in order to raise the means of paying them. The trustees were proceeding to sell when this last agreement was made and that sale countermanded.

The trustees were again proceeding to sell, pursuant to this last agreement, when the plaintiff filed his bill, claiming that the trust was void and had expired, and that he was seised of the legal estate in his share, praying a partition with the other owners, and for an injunction to restrain the trustees from selling. The injunction having been granted, a motion was now made to dissolve it.

E. Sandford & A. C. Bradley, for the defendants.

P. Y. Cutler, for the plaintiff.

EDMONDS, J. The trust originally created by the conveyance from Rogers to Noyes & Ogden was undoubtedly valid under our statutes, for it was emphatically a trust to sell lands for the benefit of creditors. (1 R. S. 728, § 55.) But its whole character was changed by the subsequent arrangements among the parties. The debt for which the original trust was created was extinguished. Rogers was discharged from all personal liability, his notes and bonds were all delivered up, or cancelled, and his residuary interest was fully released. He ceased to have any connexion with, or interest in, the property. The trust property had been taken in satisfaction of his debts, and they who had been once interested only as creditors, entitled only to payment of their debts, with a remainder over to their

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debtor, became thenceforth clothed with the beneficial interest, and with the whole of it; irrespective, (except as to partition among themselves,) of the amount of their original claims. So that but for the interposition of the trust, they became entitled to the actual possession, to the receipt of the rents and profits, and to the whole interest in the trust property. That is, under our statute, they had a legal estate therein, of the same quality and duration, and subject to the same conditions, as their beneficial interest. (1 R. S. 727, § 47.) It was a merely nominal or naked estate in trust converted into a legal estate in the persons having the beneficial interest therein. (*Matter of Dekay*, 4 Paige, 403.)

Besides, it may be questioned whether the trust was not determined in another sense. The trust was a lawful one, to sell lands for the benefit of creditors. The debts were all paid, the estate was taken in satisfaction, and there were no longer any creditors; so that under § 67 of the statute the estate of the trustees may be considered as having ceased. But it is not necessary to decide this. In the other aspect of the case, it cannot be regarded as a trust estate. What then is it? If it is an absolute legal estate in the *cestuis que trust*, then the plaintiff is right in seeking to restrain the trustees from selling, and has a right to the partition for which he prays.

But it is insisted that the right of Noyes & Ogden is valid as a power in trust; that even if the express trust created by the existing agreements was not for any of the purposes enumerated in the statute, and therefore no estate vested in the trustees, yet that the trust directed and authorized the performances of an act which may lawfully be performed under a power, and is therefore valid; (1 R. S. 729, § 58;) and that the land remains in the persons otherwise entitled, subject to the execution of the trust as a power. (*Id.* § 59. *Brown v. Wilbur*, 8 Wend. 661.)

This is the important question in the case, and though I can well see how the possession and exercise of the power of sale in the trustees, may operate to the injury of the plaintiff, and that it might be much better for him, and fairer to him, to allow him to take and manage at his own pleasure his own share of

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the trust property, yet, if under the agreements which he has made, he has granted away this power in such manner as, under the rules of law, to deprive him of the power to control it, however much it may be regretted, those rules of law cannot be made to bend to any such apparent equity.

This seems to me to be what our statute defines as a general power in trust. It is an authority to do some act in relation to lands which the owner granting the power might himself lawfully perform. (1 R. S. 732, § 74.) It authorizes the alienation in fee, by means of a conveyance to any alienee whatever. (*Id.* § 77.) And some persons, other than the grantees of the power, are designated as entitled to the proceeds or other benefits to result from the alienation according to the power. (*Id.* 734, § 94.)

The effect of the various agreements and contracts between these parties then, is this, that originally there was a valid trust estate in Noyes & Ogden to sell lands to pay the creditors of Rogers, but by the agreements of October, 1846, and February, 1847, the trust estate ceased, and Noyes & Ogden became seised of a general power in trust, to sell the same lands for the benefit of the different parties named therein.

The power is irrevocable, because no authority to revoke it is granted or reserved in the instrument creating the power. (1 R. S. 735, § 108.) It is imperative, for its execution has not been made expressly to depend on the will of the grantee, and it imposes on Noyes & Ogden a duty, the performance of which may be compelled in equity for the benefit of the parties interested. (*Id.* 734, § 96.) How then can the court interfere to prevent the execution of a power which imposes a duty, the performance of which, it is the province of the court to enforce? It might do so, if the execution of the power was inequitably or unconscionably performed. Such, it is averred, is this case; inasmuch as the plaintiff, who is the largest individual owner of any of the parties, may be compelled, for the protection of his own interest, to become at least the bidder, and perhaps the purchaser, of more than his share of the premises, and of more than he has any desire to own. This may well operate harshly

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on him, but if this is the legitimate operation of his own agreement made on a valid consideration, this court has no power to afford relief, when that relief can be furnished only by altering the agreement of the parties.

The bill, it is true, contains an averment that the plaintiff did not understand the agreement as importing an authority to sell at all events, and against his consent. But the answers controvert that allegation so distinctly, that it can be of no avail on this motion. His counsel, therefore, very properly omitted to press it, on the argument.

There is also no ground to impeach the consideration of the agreement. Under the original trust deed, the holders of the notes or bonds that first became due, might practically obtain a preference over the other creditors, at least in point of time of payment, if not in ultimate satisfaction. For such holders could require the trustees to pay the bonds or notes as they became due; and the trustees, on such demand, were bound to sell so much of the trust estate as would make that payment. Three of those creditors who are now insisting on a sale were in that condition. They had obtained such a preference, and that preference they withdrew when the agreement in question was made. The relinquishment of that preference was alone a sufficient consideration for the agreement. The value of that consideration to the plaintiff is manifest from this fact, that at the time that agreement was made, though two of his bonds, amounting to \$16,000, were due, yet those three defendants holding Vermilyea's bonds to the amount of \$16,500, had, by the notice which they had given to the trustees, obtained such a preference over him. But that was not all that entered into that consideration. The removal of the lien of the Farmers' Loan and Trust Company, and of Rogers' residuary interest, were important elements, and doubtless had their weight with all parties. If then the execution of this power should operate harshly on the plaintiff, that will not afford adequate ground for the interference of this court against a valid agreement, founded on a good consideration.

The injunction must therefore be dissolved.

SAME TERM. *Before the same Justice.*

HOLLERMAN vs. HOLLERMAN.

It is not a matter of course to order the payment of alimony, in suits for a separation merely.

The court must be satisfied that an allowance would be proper, and that some provision is necessary to enable the wife to establish her just rights.

An allowance will not be made where no ill treatment of the wife, by her husband, is shown, and where it appears that she has left him without just cause, and insists upon living separate from him.

IN EQUITY. Motion for alimony, to enable the complainant to carry on her suit against her husband for a separation. The petition sets forth the filing of the bill of complaint, which prays for a decree of separation, on the ground of abandonment by the husband; the defendant's appearance, and his ability to provide a support for the plaintiff and the means of enabling her to defray the costs and expenses of the suit; and that she is wholly destitute of property.

E. J. Porter, for the plaintiff.

A. Crist, for the defendant.

EDMONDS, J. It is not a matter of course to order alimony on bills for separation merely. The court must be satisfied that an allowance would be proper, and that some provision is necessary in order to protect the wife and allow her a full opportunity to establish her just rights. On the other hand, care must be taken lest her being allowed the means of carrying on the suit may be used for bad purposes. The bill does not complain of any infidelity on the part of the husband, nor that he ill treated his wife while they lived together. It merely complains that he refuses to support her, and in that way has abandoned her. On the other hand, he alleges in his answer, which is sworn to for the purposes of this motion, that she abandoned him, drove him from her, concealed herself from

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him, and did not return to him for any other purpose than merely to compel him to support her in a state of separation. For aught that appears, she may at any moment return to her husband and live with him, and be supported by him, and that without any suggestion, even, that she would incur any hazard of ill treatment from him. To allow a wife alimony under such circumstances would be to encourage married women to disregard their conjugal duties. The motion must therefore be denied.

SAME TERM. *Before the same Justice.*

SMITH vs. MOFFAT.

A court of equity has no power to stay the summary proceedings under the 2 R. S. 511, instituted before an assistant justice by a landlord, to remove a tenant holding over after the expiration of his term.

If a tenant sustains injury or damage by being wrongfully dispossessed of the premises, upon the summary proceedings under the statute, he has an adequate remedy by a writ of restitution, from the supreme court, or by an action at law, upon the covenant for quiet enjoyment contained in his lease.

Where a remedy is sought to be attained by a summary proceeding under a statute which is in derogation of the common law, the statute is to be strictly construed.

But where the object of a statute is remedial, it is to be construed liberally, so that it may carry out the purposes for which it was designed.

Hence, when looking at the remedy, courts have taken care that it should be made effectual, if possible, in the manner intended.

But when scanning the proceedings to attain that remedy, courts have been strict and rigid in exacting a compliance with all the requisites of the statute.

IN EQUITY. This was a motion to dissolve an injunction. Moffat was the owner of certain premises in the city of New-York, which were held by Smith on a lease for two years, ending on the 1st of May, 1847, with a further term of three years; on condition that if at any time during the last three years the landlord should choose to cancel the lease, he might

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do so by paying the tenant the fair value of his fixtures and improvements. After the expiration of the first two years, Moffat gave Smith notice that he elected to terminate the lease, tendered the tenant \$400 for his fixtures, &c. and demanded possession. The tenant refusing to surrender, on the ground that a sufficient sum had not been offered to him for his fixtures, &c. the landlord instituted summary proceedings before an assistant justice to recover possession under 2 R. S. 511, on which issue was joined, and a venire issued. This bill was then filed and an injunction issued to stay the further progress of those summary proceedings. The injunction was afterwards so far modified as to allow the landlord to go on with the trial on his summary proceedings, but staying the issuing of any warrant of removal until the further direction of this court. The trial having been had before the assistant justice, and a verdict having been rendered for the landlord therein, a motion was now made, on the bill and answer and on evidence of the termination of the trial below, to dissolve the injunction entirely, and to allow the landlord to take out and execute his warrant of removal.

W. H. Bell & F. S. Coe, for the plaintiff.

T. Warner & J. T. Brady, for the defendant.

EDMONDS, J. My first impression of this case was very decidedly against the jurisdiction assumed by this court in granting the injunction. But as I was assured that the late court of chancery had, some years since, after argument and deliberation, asserted and exercised the jurisdiction in a similar case, I have paused over my decision, have carefully examined the authorities, and have consulted my colleagues as to the correctness of my impressions. This was due to the high respectability and the deserved weight of the authority cited to me; though as the case referred to has not been reported, I am led to infer that it was not intended to be regarded as an authoritative and binding decision on the point. But as my judgment is very clear that the jurisdiction, exercised in this case, does not prop-

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erly belong to this court, I yield without reluctance to a strong repugnance which I feel to extending our jurisdiction beyond its well ascertained and established boundaries.

Prior to 1820, the proceedings of a landlord to remove his tenant who held over after his term expired, were very dilatory and expensive. The legislature then interfered, and passed the law which has since been incorporated, with some modifications, into the revised statutes. The object of that statute was to remedy the evils alluded to; and so far, it is to be construed liberally, to see that it carries out the purposes for which it was designed. But as the remedy was sought to be attained by a summary proceeding under the statute, which was in derogation of the common law, in that respect, the statute is to be strictly construed. Hence when looking to the remedy, our courts have taken care that it should be made effectual, if possible, in the manner intended. (*Lynde v. Noble*, 20 *John. Rep.* 80.) But when scanning the proceedings to attain that remedy, the courts have been strict and rigid in exacting a compliance with all the requisitions of the statute. (*Roach v. Cozine*, 9 *Wend.* 227. *Nichols v. Williams*, 8 *Cowen*, 13. *Cameron v. McDonald*, 1 *Hill*, 512. *Farrington v. Morgan*, 20 *Wendell*, 207.)

The part of the statute which is involved in this case, is that which affords the remedy, and is to be liberally construed.

The remedy proposed, as I have already remarked, was to afford landlords a speedy and prompt method of obtaining possession of lands which their tenants held over after the expiration of their term. With this view, the statute gave a very summary process of bringing in the party to answer the complaint against him; gave no authority to the officer before whom the proceedings were pending, to grant an adjournment, (8 *Cowen*, 13,) and made no provision for a review of his action, or for staying his proceedings until his errors could be corrected. This harshness was afterward somewhat softened. The power of adjournment was given. Authority to stay the issuing of the warrant of removal was given in a few specified cases. (2 *R. S.* 515, §§ 44 to 46.) And this court determined that, in the

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exercise of its common law powers, it might review the proceedings and award restitution. (*Lynde v. Noble*, 20 *John.* 80.)

The mode of review, prescribed by the practice of the court, was by the writ of certiorari, whose province it was to remove all the proceedings from before the magistrate below into this court, and thus virtually stay the proceedings below, by taking away from the officer all that conferred jurisdiction upon him. And if that writ was sued out before the judgment below was pronounced, or the warrant of removal was issued, it would seem as if a very effectual stay of proceedings was attained. In *Lynde v. Noble*, the writ was sued out before judgment was pronounced, and on a motion to quash the writ, this court held that the motion must be granted, because the writ, removing the proceedings, would virtually repeal the statute; and they held that the writ of certiorari would not lie until the case had been finally adjudicated, and even then it would not stay the warrant of removal. When our statutes were revised, the revisers having that decision in view, proposed what is now § 47 of the statute; and the legislature adopted it without alteration, and doubtless with the intention of carrying out the recommendation of the revisers and rendering the statute "conformable to 20 Johnson's Reports, 80." That section is, (2 *R. S.* 516, § 47,) that "The supreme court may award a certiorari for the purpose of examining any *adjudication* made on any application hereby authorized; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari or *any other writ or order of any court or officer.*"

The next section of the statute provides for restitution, in case the adjudication below should be reversed.

There is no manner in which I can read this statute, so as to authorize any court or officer to stay the proceedings below after they have been once commenced. Ten years experience of the operation of the law suggested its defects—those defects have been provided for—but its scope and purpose have been carefully preserved, and the 47th section, while it has provided a mode of reviewing the action of the court below, has been careful to provide, not merely that proceedings on the *adjudi-*

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cation shall not be stayed, but that none of the proceedings on the *application* shall be stayed. And the statute has gone farther even than the decision of this court. For while this court has said, in *Lynde v. Noble*, that the proceedings shall not be stayed by this court, by its writ issued to remove the proceedings before judgment, the statute has declared, in language too explicit to leave room for doubt, that no court or officer shall stay them by any writ or order whatever. I cannot imagine language that could more explicitly take away the power of a "court" of equity by its "writ" of injunction to stay the proceedings, either before or after adjudication.

This is the view of the case founded on the statute alone. There is another, founded on authority equally clear to my mind. It will be borne in mind that the case of *Lynde v. Noble* was an attempt to stay proceedings before judgment. This court, in commenting on that case, remarked, "if a certiorari will remove the proceedings into this court before a trial is had, there is nothing gained by the statute: for the tenant by that course may delay the landlord as long as he could before the passing of the act, and subject him to at least equal expense. Such a construction would virtually be a repeal of the statute. Its provisions would become useless, if the complaint, as soon as it was made before the magistrate, might be brought into this court for trial."

As in the case now under consideration, the court of chancery interfered before judgment was pronounced below, the decision of this court as quoted above is an explicit condemnation of such interference.

These views of the case grow out of the statute in question, and the decisions of the court upon it. But there is still another view springing from general principles governing a court of equity, which seems to me to be equally controlling and conclusive in this case. I allude to the familiar doctrine, as generally applicable, that equity will not interfere where the party has an adequate remedy at law. In this case, if the plaintiff should sustain any injury from unjust or illegal proceedings before the magistrate, he can be fully restored to all that he

 Starr v. Rathbun.

may lose, by the restitution which, under the 48th section of the statute, this court is authorized to award on the writ of certiorari. He may thus be restored to the possession which he has lost. And if that restitution under the statute should not be broad enough to make good to him the loss which he may sustain by being kept out of the possession during the time which may elapse from the execution of the warrant of removal to the judgment of restitution in this court, for that he would find, in this case, an adequate remedy under the covenants for quiet enjoyment contained in his lease.

As then, the plaintiff would thus have an adequate remedy at law, and as there is no suggestion in this case, that the injury which he might sustain would be irreparable, and not susceptible of pecuniary compensation, (*Hart v. Mayor of Albany*, 9 Wend. 577,) it is evident that the case is not one appropriate for the exercise of equity jurisdiction.

The injunction must therefore be dissolved.

 SAME TERM. *Before the same Justice.*

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STARR vs. RATHBONE and others.

A receiver will not be appointed in a creditor's suit where it appears from the bill itself that the plaintiff's remedy at law has not been exhausted.

IN EQUITY. Motion for a receiver in a creditor's suit. The bill alleges that the defendant is the proprietor of a large hotel in the city of New York, entertaining numerous guests, and receiving money from them, from time to time; and that he has a large amount of furniture and other personal property in his hotel. The defendant demurred to the bill, on the ground that upon the facts stated therein it appeared that the plaintiff had not exhausted his remedy at law.

JACOBS *v.* HOOKER.

H. F. Clark, for the plaintiff.

John Cochran, for the defendant.

EDMONDS, J., denied the motion, on the ground that the remedy at law did not appear to have been exhausted by the plaintiff before resorting to this court; the bill alleging that the defendant has a large amount of personal property, which, from aught that appears, may be reached by an execution at law.

SAME TERM. *Before the same Justice.*

JACOBS *vs.* HOOKER.

Where papers are served by mail, in the manner directed by the rules, the risk of miscarriage is with the party to whom they are directed.

No costs are allowed on motions, unless such motions are necessary, for the attainment of some substantial right in the cause; except they are awarded by way of punishment.

D. D. Field, for the defendant, moved to set aside a verdict and all subsequent proceedings, because a judgment as in case of nonsuit had been perfected previous to the circuit at which the verdict was obtained.

H. J. Raymond, for the plaintiff, had a cross motion to set aside the judgment as in case of nonsuit, on an affidavit stating that within twenty days after the rule for judgment, he had mailed to the defendant's attorney, agreeably to the rules, a stipulation, and within fifteen days after taxation of the costs of the circuit, had paid them.

Field, contra, read an affidavit of the defendant's attorney, denying that the stipulation had ever been received.

Willet v. Fayerweather.

EDMONDS, J. That makes no difference. The risk of miscarriage falls upon him to whom the paper was directed. The rule says that such a service shall be a good one; and of necessity, therefore, the risk must be with the party to whom it is sent. Both judgments were irregular and must be set aside; but without costs. We allow no costs on motions, unless the motions are rendered necessary for the attainment of some substantial right in the cause; except sometimes we may allow them by way of punishment. My only doubt is whether I ought not to charge the defendant with the costs of setting aside his judgment. When he received the costs of the circuit after the stipulation, he knew why they were paid, and that was enough to put him on inquiry. He ought not, after that, to have perfected the judgment. I will allow the costs of the motion to set aside that judgment to abide the event. No other costs of these motions, either way, will be allowed.

SAME TERM. *Before the same Justice.*

WILLET vs. FAYERWEATHER.

A motion once made cannot be renewed, upon the same papers, or on the same facts, without leave.

The new matter which will alone justify the renewal of a motion, without leave, must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion.

Leave to renew a motion made by a defendant, for liberty to withdraw his plea, and file an answer, will not be granted, where the testimony has been taken, and the proofs closed as to the matters set up in the plea, and where, since the plea was put in, an important witness in regard to the new defence sought to be set up by answer has died.

Nor will such leave be granted after a co-defendant has, in his answer, set up the same defence which the plea asserts, and the testimony on both sides has been closed on that issue.

A defendant, after virtually trying one defence and failing in it, will not be allowed to withdraw the same, and set up one entirely different.

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IN EQUITY. This was an application by the defendant, for leave to withdraw a plea, and file an answer. The defendant is administrator of S. Price, deceased, against whom the plaintiff had recovered a judgment previous to his decease. The plaintiff filed his bill in this cause, which charges the defendant with colluding with another judgment creditor of the intestate to give him a priority over the plaintiff's judgment, contrary to equity. The defendant interposed a plea, alleging that the plaintiff, being a solicitor of this court, purchased the judgment in question for the purpose of bringing a suit thereon, contrary to the statute. (2 R. S. 288, § 71.) Issue was joined upon the plea, and proofs were taken by the parties. On the 10th of May, 1847, the defendant applied to the vice chancellor for leave to withdraw his plea and file an answer; which motion was denied, without reserving to the defendant the right to renew it. It was not alleged that any new facts had occurred since the filing of the plea, to render it necessary to withdraw the plea. But it appeared from the affidavits read in opposition to the motion, that since the plea was put in, one of the plaintiff's most material witnesses had died.

C. Edwards, for the defendant.

H. S. Dodge, for the plaintiff.

EDMONDS, J. The language of the chancellor in *Hoffman v. Livingston*, (1 John. Ch. Rep. 211,) and of the vice chancellor in *Ray v. Conner*, (3 Edw. 478,) explicitly condemns this motion.(a) The "new matter" which will alone justify the renewal of a motion, without leave, must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion. Such is not this case. Every ground on which this application is founded existed at the time of the former motion, and was

(a) See also *Ray v. Conner*, (3 Edw. 478;) *Dollfus v. Frasch*, (5 Hill, 493;) *Powell v. Tuttle*, (10 Paige, 523;) *Mitchell v. Allen*, (12 Wend. 290.)

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then as well known to the defendant as it is now. This motion cannot, therefore, be allowed to be made without disturbing well settled and salutary rules.

Besides, if this were to be regarded as an application for leave to renew the motion, there are two reasons, which according to the practice of the court, would forbid its being granted. One is, that an important witness, not necessary for the plaintiff on the plea, but very material to him in regard to the defence set up in the answer, has died since the plea was put in. The plaintiff therefore might be irreparably injured by granting this motion.

The other reason is, that this application has not been made until after the other defendant has in his answer set up the same defence which the plea asserts, and the testimony on both sides has closed on that issue. To allow this motion, then, would be to permit the defendant, after virtually trying one defence and failing on it, to withdraw that and set up one entirely different. I am not aware of any case in which that has been allowed; and the practice seems to me to be fraught with too much danger to be sanctioned by this court.

The motion must be denied.

WESTCHESTER SPECIAL TERM, September, 1847.

Morse, Justice.

BAILEY *vs.* RYDER and others.

Upon a notice of motion for the *settlement* of issues at law, a party may apply for the *award* of issues also.

IN EQUITY. Motion by plaintiff for issues, to try the matters in dispute between the parties, by a jury; and that such issues be settled by the court, or by a referee, upon a reference for that purpose.

 Hyde v. Tanner.

Mr. Lee, for the plaintiff.

A. Lockwood & W. Reynolds, for the defendants, objected that the notice was of a motion for the *settlement*, and not for the *award*, of issues required by §§ 2 and 3 of the act of May 2, 1839, to amend the act to regulate the trial by jury and the taking of testimony in chancery. (*Laws of 1839, p. 292.*) That the notice presupposed an award of issues under the 2d and 3d sections of the act; and that the application was under the 4th section. And they insisted that the court could not *award* issues, upon a notice in this form.

MORSE, J. The notice of motion is sufficient, under the statute, and the 59th rule; although the settlement is in fact merely incidental to the award of issues. The intention of the rule was that the whole matter should be disposed of on the motion for settlement of the issues. The award of issues being necessarily precedent to their settlement, no party can be misled by such a notice as this, under the rule. And as copies of the pleadings are to be presented to the court, by the party making the application, no harm can arise from the form of the notice; although the practice under the rule may be somewhat inartificial.

Motion granted.

DUTCHESS SPECIAL TERM, September, 1847.

Barculo, Justice.

HYDE vs. TANNER and others.

Under the provisions of the title of the revised statutes respecting the powers and duties of executors and administrators in relation to the sale and disposition of the real estate of their testator or intestate, for the period of three years after the granting of letters testamentary or of administration, the real estate of which the testator

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or intestate died seised, remains liable to be sold, under an order of the surrogate, for the payment of debts, in case of a deficiency of personal assets.

This liability attaches to lands, not only in the hands of the heirs or devisees, but in the hands of any subsequent purchaser.

It is a kind of statutory lien running with the land, during the three years.

After the expiration of that period, the heirs or devisees become first liable to suit, and the power of the surrogate ceases. The land is discharged from the lien; the heirs or devisees may sell; and a *bona fide* purchaser will take the estate free and discharged from the debts.

The heirs or devisees may sell and convey the real estate of which the testator or intestate died seised, at any time after his death. But if they convey previous to the expiration of three years, the lands pass subject to the power of the surrogate to direct the same to be sold for the payment of debts.

And in case the exercise of that power becomes necessary, by reason of a want of personal assets, the title made under the surrogate's sale will be paramount to all titles made by or through the heirs or devisees; and will convey the estate precisely as it was left by the decedent.

Where an antecedent equity is clearly established in favor of a party seeking relief, and the legal right has been extinguished under circumstances which will authorize an inference of a mistake in fact, a court of equity will presume such mistake, and enforce the claim, to prevent manifest injustice and hardship.

IN EQUITY. On the 29th of April, 1844, Nicholas Tanner, father of the defendant Joseph D. Tanner, executed a mortgage to the plaintiff for \$4500. On the 30th of September, 1845, Nicholas Tanner died intestate, leaving Joseph D. Tanner and Henry Tanner, his sole heirs at law, and being seised of the real estate covered by said mortgage. On the 27th of April, 1846, Henry conveyed his interest to Joseph; the latter assuming the payment of the mortgage. On the 28th of April, 1846, Joseph applied to the plaintiff for a loan of \$430, which sum the plaintiff lent him; making, together with the mortgage debt and interest, the sum of \$5200; for which Joseph executed a mortgage upon the same premises. On the 29th of April, 1846, the plaintiff cancelled the mortgage given by Nicholas Tanner, without having received payment, except the mortgage given by Joseph. In December, 1846, the creditors of Nicholas Tanner, deceased, requiring payment of their debts, Joseph applied for letters of administration; and such proceedings were had, that on the 5th of January, 1847, letters of administration were granted to Joseph D. Tanner and George Huffart, jun. The

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debts against the estate were ascertained to be over \$1300, while the assets amounted to but \$35. The administrators therefore applied to the surrogate of Dutchess, under the statute, for authority to lease, mortgage, or sell the real estate of the intestate. On the 12th of April, an order was made by the surrogate that the administrators should sell the lands in question.

Under this order the administrators were proceeding to advertise and sell the real estate, when the plaintiff filed his bill in this cause, and restrained them by injunction. The plaintiff now seeks to have the lands sold, and the proceeds applied in payment of his mortgage debt.

The defendant, Shadrach S. Taber, recovered a judgment in the Dutchess common pleas against Joseph D. and Henry Tanner for \$105 damages and costs, on the 24th of April, 1846.

E. M. Swift & H. Swift, for the plaintiff.

J. Emott, jun., for the defendants Joseph D. Tanner and George Huffart, jun., administrators, and Richard H. Sherman.

William Eno & C. J. Ruggles, for the defendant Taber.

BARCULO, J. This case involves the consideration of the following questions: 1. Can the creditors at large, of a deceased intestate, reach the real estate of the debtor after it has been aliened by the heir to a *bona fide* purchaser? 2. Can the mortgagee, after having cancelled the mortgage given by the intestate, and taken a new mortgage from the heir, set up the first mortgage, as against the general creditors?

In considering the first question, it is necessary to assume that the plaintiff is in the situation of a *bona fide* purchaser. He holds a mortgage executed by the heir to secure a loan of \$5200, made partly to the heir and partly to the ancestor. His rights, therefore, under the mortgage are, to the extent of the mortgage debt, as valid as if he held by simple deed for valuable consideration. Nor is the evidence sufficient to charge

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him *with notice* of the outstanding debts against the intestate. The case is free from embarrassment in this respect. The plaintiff occupies the position of a mortgagee in good faith, holding under a mortgage executed by the heir litigating for priority with the creditors of the ancestor.

According to the English rule, when a testator, by his will, charges his debts, or his debts and legacies, upon lands, a *bona fide* purchaser from the devisee or executor takes the lands discharged from the lien. This doctrine is recognized in a number of cases. (*Eland v. Eland*, 1 Beav. 235. *S. C. on appeal*, 4 Myl. & Cr. 420. *Ball v. Haines*, *Id.* 266. *Jones v. Price*, 11 Sim. 557. 2 Sim. & Stu. 206, n. 1.) The principle of this rule is that the purchaser is not bound to see to the application of the purchase money. The purchaser having paid his money in good faith, it devolves upon the creditors to see that it is applied in payment of the debts of the testator. By analogy, it would seem that, independent of any statute, the same rule should be applied to an alienation by the heir of an intestate.

But in this state, the whole matter is regulated by statute. The first section of the title of the revised statutes relative to the powers and duties of executors, &c. in relation to the sale and disposition of real estate, (2 R. S. 100,) provides that "after the executors or administrators of any deceased person shall have made and filed an inventory according to law, if they discover the personal estate of their testator or intestate to be insufficient to pay his debts, they may, at any time within three years after the granting of their letters testamentary or of administration, apply to the surrogate for authority to mortgage, lease, or sell so much of the real estate of their testator or intestate, as shall be necessary to pay such debts." This statute necessarily implies that the surrogate has power to hear such application and grant the order applied for. It also follows that, if the order is to be effectual, it must be able to reach all the real estate of which the testator or intestate died seised. That such was the intention of the legislature is apparent from the language of the 17th section of the same title; which declares that "a lease or mortgage executed under the authority of the surrogate as afore-

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said, shall be as valid and effectual, as if executed by the testator or intestate *immediately previous to his death.*" (*Id.* 103.) It needs no argument to show that the effect given to a lease or mortgage, in this section, is inconsistent with the power of the heir or devisee to alien and convey an unincumbered title within three years after the granting of letters testamentary or of administration.

Again ; the 18th section provides that if the moneys required cannot be raised by lease or mortgage, the surrogate shall order "a sale of so much of the real estate *whereof the testator or intestate died seised*, as shall be sufficient to pay the debts," &c. This section clearly gives the power to sell, in case it is required, all the real estate owned by the debtor *at the time of his death*, without regard to any subsequent conveyances. The only restriction upon this authority is contained in the 20th section, by which it appears, that if any of the lands so left "have been sold by the heirs or devisees, then the lands remaining in their hands unsold, shall be ordered to be *first sold*:" implying that in case the proceeds of those lands should be insufficient, then the order of the surrogate shall direct the lands aliened by the heirs or devisees to be *secondly sold*.

It may be well, in this connexion, to refer to the statutory remedy given to creditors against heirs and devisees. The 53d section of the same title enacts that "no suit shall be brought against the heirs or devisees of any real estate, in order to charge them with the debts of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon the estate of their testator or intestate ; and if after the expiration of that time, such suit shall be brought, upon proof of an application having been made, before the expiration of that period, for an order of sale pursuant to the provisions of this title, such suit shall be stayed by the court in which it shall be pending, until the result of such application." (2 R. S. 106.)

The several provisions of the statute are entirely consistent with each other. They admit of but one construction. For the period of three years after the granting of letters testamen-

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tary or of administration, the real estate of which the testator or intestate died seised, remains liable to be sold under an order of the surrogate for the payment of debts, in case of a deficiency of personal assets. This liability attaches to the lands, not only in the hands of the heirs or devisees, but in the hands of any subsequent purchaser. It is a kind of statutory lien running with the land, during the three years. After the expiration of that period, the heirs or devisees become first liable to suit; and the power of the surrogate ceases. The land is discharged from the lien; the heirs or devisees may sell; and a *bona fide* purchaser takes the estate free and discharged from the debts. (2 R. S. 455, §§ 51, 61.)

It is not intended to be said that the heirs or devisees may not alien prior to the expiration of the three years. They may sell and convey at any time after the death of the testator or intestate. But if they convey before the expiration of that period, the lands pass subject to the power of the surrogate to direct the same to be sold for the payment of debts. And in case the exercise of that power becomes necessary, by reason of a want of personal assets, the title made under the surrogate's sale will be paramount to all titles made by or through the heirs or devisees, and will convey the estate precisely as it was left by the decedent.

Applying these views of the law to the case under consideration, the plaintiff must fail in his attempt to establish the mortgage of Joseph D. Tanner as a lien upon the real estate of Nicholas Tanner, prior to the claims of the creditors of the latter.

The second question to be examined is, whether the facts of the pre-existence of the debt of \$4500, and of the mortgage given by the intestate, together with the circumstances of the cancellation of that mortgage and the execution of a new one by Joseph D. Tanner, do not authorize and require this court to set up the old mortgage, or prefer the plaintiff's claim for the amount secured by that, to the claims of the general creditors of the deceased.

In the first place, it is to be remarked that neither of the an-

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tagonistic claimants has a *legal lien* upon the premises. It is a question of equitable liens. If the court is satisfied that the plaintiff has the superior equity, it has the power to give him a preference over the claims of the creditors. The only ground upon which the plaintiff can ask relief, on this point, is, that the first mortgage was cancelled through mistake, such as a court of equity will rectify.

There is indeed a strong presumption, arising from the circumstances attending that transaction, that the plaintiff acted under a mistaken view of his rights. For no reasonable man, who fully understood the effect of his acts, would accept the mortgage of the heir in lieu of that of the ancestor, while the estate of the latter remained unsettled, and liable to a large amount of debts. But whether the plaintiff was mistaken as to the *fact* of the existence of these debts over and above the amount of the personal assets, or whether he was merely mistaken as to the legal effect of the new mortgage, does not so clearly appear. If it was a mistake of the *fact*, then a court of equity, according to established principles, will relieve against it. If it was a mistake of *law* only, no relief can be given. (*Story's Com. on Eq.* § 110 to 183.) Judge Story thus lays down the law; although it must be conceded that the English decisions are by no means uniform on the subject. There are several cases reported in which the courts have granted relief against what appeared to be a mere ignorance of the law. In the case also of *Hunt v. Rousmanier*, (8 *Wheat. Rep.* 174,) Chief Justice Marshall, in delivering the opinion of the court, says: "Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." In that case, Hunt deliberately took a power of attorney with authority to sell the property, instead of a mortgage, to secure the payment of a loan of money; upon the mistake of law, that the security by the former instrument would bind the property equally as strong as a mortgage. But the debtor, Rousmanier, dying, the power of attorney became revoked and

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ineffectual as a security. Hunt then brought his bill in equity against the administrators of Rousmanier, to reform the instrument, or to give it a priority by way of lien on the property. The defendants demurred to the bill, and the circuit court of Rhode Island sustained the demurrer, and dismissed the bill. On appeal, the supreme court of the United States reversed the decision. The opinion in that case concludes as follows: "We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

The defendant's counsel cited the recent case of *Banta v. Garmo*, (1 *Sand. Ch. Rep.* 383.) In that case, Garmo had, in 1831, executed a mortgage to the county clerk for \$2100. On the 25th of July, 1838, he borrowed \$2200 of Banta, paid up the old mortgage and had a satisfaction piece executed, and gave Banta a new mortgage upon the same premises. In 1837, a judgment was recovered against Garmo, and the lands were sold by execution thereon in February, 1838. Banta claimed the right to set up the mortgage to the county clerk, and to be subrogated to the same, as against the intervening judgment. The assistant vice chancellor denied the relief. That case differs essentially from the present, in this respect: There the first mortgage was delivered up by a stranger: here the first security was given up by the party who seeks to set it up again. The assistant vice chancellor adverts to the distinction when he says: "The adjudged cases relied upon, where parties were allowed to have relief upon instruments delivered up in ignorance of facts, were all cases in which the right was revived in behalf of the parties who had delivered up those instruments under such mistake." If in that case Banta had held the oldest mortgage, and had cancelled it under a misapprehension of facts, so as to let in the judgment, it is very possible the decision would have been different.

A similar decision was made in the case of *Garwood v. Admr's of Eldridge*, (1 *Green's Ch. Rep.* 145.) That was a case in which Garwood, having purchased real estate subject

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to two mortgages and a judgment, applied the whole of the purchase money to the payment of the mortgages, and caused them to be cancelled of record. The property was then sold under the judgment, which was younger than the mortgages. Garwood then filed his bill for relief against the judgment and sale under it; setting forth that he was ignorant of the existence of the judgment, and claiming the interposition of the court, upon the ground of a mistake of facts, and upon the ground that a court of equity should revive the mortgages for his benefit. The chancellor of New Jersey denied the prayer of the bill, for the reason that the mistake, if any, was merely of law; and that the cases in which the court keep alive a discharged mortgage, are those where the mortgage is discharged by a third person, and not where it is taken up by the obligor himself.

The rule was certainly applied in that case more rigidly than is usually done in the English courts. Indeed, it is difficult to discover how the question turned upon a mistake *in law*. It could hardly be pretended that Garwood was ignorant of the legal effect of cancelling the mortgages. It is evident that the mistake was one *of fact*; that he was ignorant of the existence of the judgment. If so, he was entitled to relief, according to the English decisions.

Thus in *Pusey v. Desbouvrie*, (3 *P. Wms.* 315,) Lord Chancellor Talbot set aside a release of her orphanage share executed by a daughter of a freeman of London. Her father had left her a legacy of £10,000: and she was informed by her brother that she was entitled to her election; to take an account of her father's personal estate and claim her orphanage share, or to take the legacy. She chose the latter. Relief was granted: the court *presuming* that she was ignorant of the fact that she had a right to have the account taken, and the amount of her orphanage part ascertained, before she made her election.

The principle upon which courts of equity proceed cannot, perhaps, be better illustrated, than by a reference to a class of cases in which a joint obligation has been set up against the representatives of a deceased obligor, who were discharged at

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law. (*Simpson v. Vaughan*, 2 Atk. 31. *Bishop v. Church*, 2 Ves. 100. *Underhill v. Howard*, 10 Id. 209. *Thomas v. Frazer*, 3 Id. 399. *Hunt v. Rousmanier*, 8 Wheat. 174. *Story's Com. on Eq.* § 162, n. 1.) In these cases no mistake was expressly established. In the language of Judge Story, the mistake is "implied from the nature of the transaction." Lord Eldon says, "the court has inferred, from the nature of the condition, and the transaction, that it was made joint by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation." It will be perceived that the mistake is always *inferred*. No actual proof is necessary. All that is required is to establish an antecedent equity, by showing that the deceased obligor received a benefit from the obligation. Thus, if a joint obligation be given for a loan of money, and one of the obligors die, by which the legal obligation is discharged, the court will presume a mistake in drawing the bond, and set it up as a several bond against the representatives; provided it appears that the deceased obligor received a portion of the money, but not otherwise.

The principle deduced from the numerous authorities on this subject is this: Where an antecedent equity is clearly established in favor of the party seeking relief, and the legal right has been extinguished under circumstances which will authorize an inference of a mistake in fact, a court of equity will presume such mistake, and enforce the equitable claim, to prevent manifest injustice and hardship.

Now, in applying this doctrine to the case before us, we find, in the first place, a strong antecedent equity in favor of the plaintiff, in the fact that the sum of \$4500 was the proper debt of the intestate, and was secured by his mortgage upon the premises in question. That mortgage was cancelled without payment of the debt, or any other consideration, except the new bond and mortgage given by the heir. The circumstances will authorize the inference that this was done under a mistake of fact as to the existence or amount of the intestate's debts,

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and as to the insufficiency of the personal assets to satisfy them. The plaintiff therefore comes within the rule entitling him to the aid of this court. ●

The decree which is to be entered must provide for a continuance of the injunction and for the sale of the mortgaged premises, and for the distribution of the proceeds of the sale, as follows: 1. The amount which would have been due on the first mortgage is to be first paid. 2. The amount of debts of the estate of Nicholas Tanner, as ascertained by the surrogate, with interest, is to be next paid. 3. The costs of all the parties must be next paid; rateably in case of a deficiency. 4. The judgment of Taber is next to be paid. 5. Then an amount is to be applied towards the balance due on the mortgage given by Joseph D. Tanner, sufficient to satisfy the same. 6. The residue, if any, to be paid to Joseph D. Tanner.

SAME TERM. *Before the same Justice.*

BUTLER vs. CUNNINGHAM and others.

Nature and office of an original bill.

What is a supplemental bill.

An original bill in the nature of a supplemental bill embraces, in some degree, the qualities of both an original bill and a supplemental bill.

The foundation of a bill of that description is an event occurring after the commencement of a suit in a court of equity, which event is of such a nature that the suit cannot be continued, as to all the parties, by a mere supplemental bill; and therefore, in regard to those parties, it partakes of the character of an original bill.

If the event determines the interest of one of several defendants, and his interest becomes vested in another, by title not derived from the former, the present owner of the interest must be brought in by an original bill in the nature of a supplemental bill.

So also, in case one of several plaintiffs is deprived of his interest in the suit, the defect may be supplied by such a bill; which is an original bill as to the new parties and new interests, but supplemental as to the old parties and the old interests. And if a sole plaintiff assigns his whole interest, or is deprived of it, subsequent to

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the commencement of the suit, as in case of bankruptcy, the plaintiff being no longer able to proceed, for want of interest, his assignees can only obtain the benefit of the proceedings by a bill of this kind.

But a person whose claim is not founded upon an event happening since the filing of the original bill, but upon an assignment made to him by the plaintiff, prior thereto, has no right to file an original bill in the nature of a supplemental bill.

IN EQUITY. In October, 1837, Stephen Germond Mott filed a bill in chancery against Walter Cunningham, to obtain the specific performance of a contract to exchange lands, made in April, 1837, and to be performed on or before the first day of May, 1837. Cunningham put in his answer in February, 1838, and in December, 1840, a decree was made by the assistant vice chancellor, directing a reference to a master to ascertain the title of the complainant, &c. - On the 20th of May, 1841, the master made his report, which was confirmed in October, 1841. In October, 1842, Mott filed a supplemental bill against Cunningham and wife and Alexander Forbus; it appearing from Cunningham's answer that he had conveyed the lands to Forbus. In January, 1843, Forbus filed an answer to the supplemental bill. On the 11th July, 1843, a motion was made by the complainant to refer the cause to the assistant vice chancellor; which was denied by the chancellor, on the ground that it appeared that Mott had been declared a bankrupt, and his assignee was not a party to the suit. Subsequently Ammi T. Butler, the present plaintiff, filed his bill in this cause, setting forth the above facts, and stating that on the 4th of May, 1837, Mott assigned all his estate to him in trust for the payment of his debts. This bill further states that Mott has been discharged under the bankrupt act; and that the plaintiff "is advised that the proceedings upon the said original bill and the said supplemental bill have been in such form, and your orator's title has been acquired in such a mode, that your orator can only have relief in the premises by filing this your orator's *original bill in the nature of a supplemental bill*, and by means thereof praying for and claiming the benefit of said previous proceedings, and said original and supplemental bill and decree thereon."

The bill requires an answer to all the matters and things

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"hereinbefore stated and charged," and to all the matters and things "herein mentioned to have been stated and set forth in said original and supplemental bill, and that your orator may have the full benefit of the proceedings had under the said original and supplemental bill, and of the said decree," &c. ; and prays that the defendants may be required to convey, &c. and to pay the costs of this suit "and of the previous proceedings had upon the said original and supplemental bill."

The defendants demurred to the bill.

D. Marvin, for the plaintiff.

C. J. Ruggles & L. Maison, for the defendants.

BARCULO, J. The case turns upon a question of pleading. It is contended on the part of the plaintiff that the bill presents a proper case for "an original bill in the nature of a supplemental bill." This the defendants deny. It is for the court to resolve the question. What then is the proper office of an original bill in the nature of a supplemental bill ?

An original bill is defined to be one which relates to some matter not before litigated in the court, by the same persons, and standing in the same interests. (*Story's Eq. Pl.* § 16. *Mitf. Eq. Pl.* 61. 1 *Barb. Ch. Pr.* 34.)

A supplemental bill, properly so called, is a bill filed for the purpose of supplying a defect, which has arisen in the progress of the suit, by the happening of some event subsequent to the filing of the original bill ; and is in continuation of the original suit. (*Lube's Eq. Pl.* 136. 1 *Paige*, 291. *Story's Eq. Pl.* § 332.)

An original bill in the nature of a supplemental bill embraces, in some degree, the qualities of both an original bill and a supplemental bill. The *foundation* of a bill of this description is an event occurring after the commencement of a suit in a court of equity, which event is of such a nature that the suit cannot be continued, as to all the parties, by a mere supplemental bill ; and therefore in regard to those parties, it partakes of the char-

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acter of an original bill. If the event determines the interest of one of several defendants, and his interest becomes vested in another, by title not derived from the former—as in the case of the determination of an estate for life, and the vesting of a subsequent remainder—the remainderman must be brought in by an original bill in the nature of a supplemental bill; for, as to him it is an original bill, but, as to the other defendants, it is supplemental. So also, in case one of several plaintiffs is deprived of his interest in the suit, the defect may be supplied by such a bill, which is an original bill, as to the new parties and new interests, but supplemental as to the old parties and old interests. And if a sole plaintiff assigns his whole interest, or is deprived of it, subsequent to the commencement of the suit; as in case of bankruptcy, the plaintiff being no longer able to proceed for want of interest, his assignees can only obtain the benefit of the proceedings by a bill of this kind.

But in the case under consideration the plaintiff's claim is not founded upon an event happening since the filing of the original bill. He claims by virtue of the assignment made to him on the 4th of May, 1837, several months before the commencement of the original suit by Mott. He does not claim to be the assignee in bankruptcy; nor that that assignment gave him any rights or interests. He sets forth the bankruptcy of Mott merely as a reason why Mott cannot further proceed in the cause. This is undoubtedly a good reason for arresting Mott's proceedings; but is by no means a reason for authorizing the present plaintiff to come in and continue those proceedings, under a title obtained prior to the commencement of the original cause. There is nothing found in the books to justify such a practice; nor is there any sound principle of equity pleading which will permit it.

The demurrer must therefore be allowed, and the bill be dismissed with costs; without prejudice to the plaintiff's right to file an original bill.

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ORANGE SPECIAL TERM, September, 1847. *Strong*, Justice.

HUDSON, executor, &c. *vs.* REEVE.

An assignee of a specialty cannot maintain an action upon it, at law, in his own name, without an express promise of payment to him, by the original debtor.

The delivery of a bond to a legatee by the executor, in pursuance of a specific bequest thereof contained in the will, vests the property in such bond in the legatee, subject only to contribution in case of a deficiency in the assets, for the payment of the debts of the testator.

Where a legatee in a will is appointed executrix thereof, she may, in her character of executrix, assent to the legacy to herself, and such assent will vest the title to the legacy in her.

If a creditor is unable to recover, in an action at law, a debt due to him, in consequence of some technical rule of law, he may resort to a court of equity. Accordingly, where the executor of a person to whom a bond is given by the will of the obligee, cannot sue thereon, at law, because the obligor is himself the administrator of the obligee, he may file a bill in equity against the obligor, to compel the payment of such bond by him.

IN EQUITY. The bill set forth that the defendant being the son of the testatrix, on the first of November, 1824, executed a bond to one Joanna S. Reeve, daughter of the complainant's testatrix, Nancy Reeve, conditioned for the payment of \$1000 in one year from that date. That he paid to her the interest on such bond up to the 1st of November, 1828. That on the 9th of June, 1829, Joanna S. Reeve made her will, and thereby bequeathed the bond specifically to Nancy Reeve, whom she constituted sole executrix of such will, and that Joanna died previous to the 1st of December, 1829. That at the time of her death the principal sum of \$1000, with interest from the 1st of November, 1828, was due on the bond. That Nancy Reeve proved the will and took upon herself the administration thereof. That she paid all the debts, and fully administered the estate of the deceased, except collecting the amount due on the bond. That she thereupon became entitled to such bond as her sole property, and held it accordingly. That the defendant paid the interest thereon up to the 1st of November, 1840, and that the principal and the interest from that date were still due. That Nancy Reeve, on the 15th of January, 1832, made her

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will, of which she constituted the complainant sole executor. That she died in the month of November, 1844, and that on the 10th day of January following the plaintiff proved the will, and took upon himself its execution. That he found the bond among, and a part of, the assets of her estate. That the defendant refused to pay the bond. That the plaintiff, in order to enable him to recover the amount due on the bond at law, on the 13th of January, 1847, presented a petition to the surrogate of Orange county, praying that he might be appointed administrator of the estate of the said Joanna S. Reeve, deceased, with her will annexed. That notice of such application was served upon the defendant as next of kin, who thereupon, on the 23d of the same month, also presented a petition to the surrogate to be himself appointed such administrator. That the defendant being entitled to such letters of administration, the surrogate granted them to him on the 26th of January, 1847. The plaintiff averred that the defendant, at the time, knew that the debts of Joanna S. Reeve had all been paid, and that all her estate, except the bond, had been fully administered; and that he took out such letters only with a view to prevent the plaintiff from recovering the amount due on the bond, at law. That the plaintiff could not in fact maintain a suit at law against the defendant on such bond, and therefore prayed that the defendant might be decreed to pay him the amount due thereon.

The defendant, by his answer, admitted the material facts set forth in the bill, but he alleged his ignorance as to whether Nancy Reeve collected all the debts due to Joanna S. Reeve, or paid all the debts owing by her; and he stated that he had been informed and believed that her estate was not fully administered. He denied that the bond was the property of Nancy Reeve, but he admitted that he paid her interest. He alleged, however, that it was in her character of executrix. He denied the plaintiff's right to collect the moneys due on the bond as executrix of Nancy Reeve, and said that he refused to pay it to her, as he thought it unsafe for him to do so. He admitted that he took out letters of administration upon the estate of Joanna S. Reeve, but denied that it was for the purpose of obstructing

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the plaintiff in the recovery of the money due on the bond at law. And he insisted that the plaintiff had a full remedy at law, and therefore denied his right to a decree for the amount due, in a court of equity.

J. W. Brown, for the plaintiff.

J. B. Booth, for the defendant.

STRONG, J. It is settled that an assignee of a specialty cannot maintain an action upon it at law in his own name, without an express promise of payment to him by the original debtor. (*Dubois v. Doubleday*, 9 Wend. 217.) In this case, no such express promise was proved, or alleged. On the contrary, the defendant avers in his answer, that the payments made by him to Nancy Reeve were made to her in her character as executrix of the obligee; and he denies that the bond was her individual property.

That the bond had become the individual property of Nancy Reeve, there can be no doubt. (*Kirby v. Potter*, 4 Ves. 748.) If she had not been the executrix of the obligee, the delivery of the bond to her, by an executor, in pursuance of the specific bequest contained in the will, would have vested the property in her, subject only to contribution in case there should be a deficiency in the assets for the payment of the debts of the deceased. As executrix she could undoubtedly assent to the legacy; and that would equally vest the title to the bond in her. The endorsements upon the bond given in evidence would seem to indicate that she was aware of the distinction between holding the bond in her own right and as executrix. She subscribes the first receipt for interest, after the death of Joanna S. Reeve, as executrix: the subsequent receipts are subscribed by writing her name, without any addition. At the time prescribed by the statutes for the payment of legacies, in cases where no specific directions are given in the will, if not before, the legatee had a right to the possession and enjoyment of the property given her; and there is nothing to show that she did not intend to

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exercise the right. The death of Nancy Reeve happened after the revised statutes took effect, and therefore her executor could not interfere in the administration of the estate of Joanna S. Reeve; nor could he conduct a suit at law as her representative. If it became necessary for him to institute such a suit for the recovery of money to which, as executor of Nancy Reeve, he was equitably entitled, on a specialty given to her, he could do so only by taking out letters of administration with the will annexed. He attempted to do so, and evidently with the sole view to enable him to recover the money due on the bond. The defendant interposed, and took out such letters himself. He avers in his answer, (which, however, is not verified by his oath,) that he did not intend to obstruct the plaintiff in the recovery of the amount due on the bond at law. That was not his object. But he does not state what other object he had in view; and it is difficult to conceive of any other. Joanna S. Reeve had been dead seventeen years. The plaintiff avers that the debts had all been paid, and the defendant admits that he does not know of any debt existing at the time of putting in his answer. The defendant, it is true, avers that her estate had not been fully administered: but he does not state in what particular; and it is evident that in this, he refers to the bond in question, alone. Had he in fact supposed that the estate of Joanna S. Reeve had not been substantially settled, and had he been anxious that it should be, he would not have deferred taking out letters of administration from the time of the death of her executrix, in November, 1844, until January, 1847.

It was not denied, on the argument, but that if the real creditor is unable to recover a debt at law, in consequence of some technical rule, a resort may be had to a court of equity. That principle is too well settled to be disputed. (*Story's Eq. Pl.* 374, § 473.) In this case the plaintiff cannot maintain a suit at law in his own name, as has already been shown. Nor can he use the name of the present legal representative of the obligee; as such representative is himself the debtor. He cannot therefore maintain a suit at law.

It was suggested on the argument that the plaintiff might

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have an effectual remedy in the surrogate's court. That the defendant might be summoned before that tribunal to account and pay over what might be found to be due. But to account for what? For the assets of the testatrix left *unadministered at the time of his appointment*. Now such assets, so far as they related to the bond in question, had been administered long before. The executrix of the obligee was not, *ex officio*, bound to collect the amount of a bond specifically bequeathed. The duty to do so, if it had ever existed, ceased the moment that the bond was delivered to, and accepted by, her as legatee. All that could be required of the legal representative appointed after that, would have been a permission from him to use his name as plaintiff in a suit at law. But he would have no more to do with the suit, nor with the money when recovered, than the ordinary assignor of any specialty. The surrogate could not, therefore, have called the defendant to an account for the bond in question; nor would his sureties have been responsible for the payment of the amount due on it.

But if it had been otherwise, if the defendant could be called upon by the surrogate to account for the moneys due on the bond, would that afford to the plaintiff a direct, certain, and adequate remedy, such as is requisite to oust this court of jurisdiction? The defendant is the debtor from whom all the funds would have to be collected before the debt could be paid. Before paying the debt, he would deduct all the expenses of administration, including his own per centage, and he would also be entitled to a delay of eighteen months before he could be called upon to account at all. Some of these difficulties, it is true, might exist in the settlement of any estate, and would not ordinarily justify a resort to a court of equity. It is necessary that the estates of deceased persons should be settled by executors or administrators, and the law justifies a delay which it compels. But so far as it relates to the action of the defendant in this case, there was no necessity for the interposition. The estate of Joanna S. Reeve had been fully settled. The difficulties have been thrown in the way of the plaintiff's recovery at law, without the slightest exigency. To allow the de-

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fendant thus to postpone the payment of his own debt, to embarrass the plaintiff in its recovery, and to retain for his own use a part of it which properly belongs to others, in the shape of commissions to himself, would be inequitable; and I am satisfied that this court can, and ought to, afford the requisite remedy.(a)

The defendant must pay the amount due with costs; and a decree must be entered accordingly.

(a.) It is provided by statute, (*Laws of 1835, ch. 197, 2 R. S. 3d ed. 445, § 5,*) that the assignee for a valuable consideration of any bond, note, or other chose in action, may sue thereon, and recover in his own name, in case the assignor is dead, and no executor or administrator has been appointed upon his estate, or if such executor or administrator has no interest in the thing assigned, or refuses to prosecute for the same. The above case does not come within this section; for an administrator *had* been appointed upon the estate of the assignee, and such administrator *had* an interest in the thing assigned; and he did not refuse to prosecute for the same, but he *could not* prosecute; for he could not sue himself. Had there been no administrator appointed upon the estate of the obligee in the bond, the plaintiff could have sued upon the bond at law, under this section of the statute, in his own name, as assignee by operation of law.

Strong J.
SAME TERM. *Before the same Justice.*

TUCKER and wife vs. BALL and others.

Where a testator devised his real and personal estate to his wife for life, or during her widowhood, and directed his executors, after her decease, or marriage, to sell his real estate, the avails of which he gave and bequeathed as follows: one half thereof to be equally divided amongst the children of J. and P. T., and the other half between J. R., A. R. and J. R.; and A. R. died previous to the death or marriage of the widow, and before the sale of the real estate; *Held* that his share of the avails of the real estate became vested in him immediately upon the death of the testator, although not payable until after the sale. And that upon the death of A. R. unmarried and intestate, such share did not belong to the heirs of the testator, as a lapsed legacy, but to the representatives of A. R.

Legacies payable at a future day are vested, or contingent, according to the intention of the testator.

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In many cases, words of doubtful import in a will have acquired a meaning by legal interpretation. When that has been uniform, it becomes a rule of law; and it should govern all cases in which it is applicable, although it may be against the apparent intention of the testator. For it is better that the wishes of an individual should be defeated, in a particular instance, than that a rule of law established for the general good, should be varied in its application.

As a general rule, it is fair to presume that a testator intends to give something, absolutely, to the persons named as legatees.

That inference should be conclusive, unless a condition is clearly annexed to the gift, or can be plainly inferred.

Courts of justice generally lean that way, from a disposition to carry into effect the will of the testator.

Where the words in a will, denoting a gift, are in the present tense, but the direction for the payment is in the future, the fair import of the language is that there is a present gift, of moneys, to be paid thereafter.

A direction for a division of an estate among several persons, by the executors, is equivalent to a direction for the payment, to the legatees, of their respective shares.

In such cases the interest is vested, and transmissible.

The rule that a testator is to be deemed to have intended that the same words, used in different parts of his will, should convey the same interests, is a sound one; and wills should be construed accordingly.

Where a testator directs that his executors shall sell his lands immediately after his decease, and pay the interest of the avails to his widow until her marriage, or death, and then divide the avails between certain legatees, the bequests to such legatees will vest immediately.

And the fact that the use of the land is devised to the widow of the testator, and the sale postponed to the time of her death, or marriage, will not make any substantial difference in the rights of the legatee. Nor will the circumstance that the legacy is to be raised by a future sale of real estate, vary the construction of the will; where the sale is postponed on account of the estate for life in the widow, and not with reference to the circumstances of the legatee.

IN EQUITY. Jacob Lewis, of Munroe in the county of Orange, by his will dated on the 23d day of July, 1820, amongst other things, devised and bequeathed as follows: "I give and bequeath to my wife Eunice Lewis all my real and personal estate, except such of my personal estate as is hereinafter otherwise bequeathed, whether it consist of lands and tenements, goods and chattels, or moneys due to me on bonds, notes or otherwise, for her own use and benefit so long as she remains my widow, or during her natural life." And after giving a legacy of five dollars to his daughter Polly Tucker, to be paid when she should call for it, and another of \$100 to his grand-

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daughter Mary Tucker, to be paid when she should arrive at the age of twenty-one years, in money, the will proceeds as follows: "4th. It is my will that after the decease or marriage of my widow Eunice Lewis, that my executors should sell, and I hereby authorize them to sell, all my real estate to the best advantage, the avails of which I give and bequeath in the following manner, viz. one half of the money arising from the sale of my lands to be equally divided by my executors amongst the children of Joshua and Polly Tucker; the other half of such moneys to be equally divided by my executors between John Rednor, James Rednor and Abraham Rednor. 5th. I give and bequeath unto Jacob L. Rednor, son of Peter Rednor, the sum of fifty dollars, to be paid to him by my executors whenever he shall arrive at the age of twenty-one years." And he appointed his wife Eunice Lewis executrix, and James Ball and Joseph R. Andrews executors.

The testator died on the 1st of August, 1820. The executrix and executors soon afterwards proved the will. Polly Tucker, named in the will, was the only legitimate child and heir at law of the decedent. John Rednor, James Rednor and Abraham Rednor were his illegitimate children by one Catharine Rednor. Abraham Rednor died on the 12th of May, 1829, intestate, and never having had any children or been married, leaving him surviving his mother, the said Catharine Rednor, and her natural children the said John Rednor and James Rednor, and also Daniel Rednor, Peter Rednor and Abigail Compton, wife of Stephen Compton.

Eunice Lewis, the testator's widow, never married again, and died in May, 1845. On the 2d of April, 1846, the other executors sold and conveyed the real estate of the testator for \$5328. They paid the one half of the net avails to the children of Joshua and Polly Tucker, the one-sixth part to John Rednor, another sixth part to James Rednor, and they retained the sixth part bequeathed to the deceased Abraham Rednor.

The plaintiffs, in right of the said Polly Tucker, as the only heir at law and next of kin of the testator, claimed the last mentioned sixth part, as a lapsed legacy. And as the execu-

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tors declined paying it to them, they filed their bill in this cause against the executors, and Catharine Rednor, Daniel Rednor, John Rednor, James Rednor, Peter Rednor, and Stephen Compton and Abigail his wife, to obtain it. The executors answered, submitting the matter to the court. Catharine Rednor, John Rednor and Peter Rednor also answered, but did not deny any material allegation in the bill. The bill was taken *pro confesso* against the other defendants. The case came before the court on the bill and answers.

S. J. Wilkin, for the complainants.

J. W. Brown, for the defendants.

STRONG, J. Legacies payable at a future day are vested, or contingent, according to the intention of the testator. Ordinarily, such intention is clearly manifested by the language in the will. But it sometimes happens that the phraseology is obscure, or that the testator has used terms in a sense different from that generally given to them; or that he wishes to accomplish objects so inconsistent with each other that all cannot prevail. In such cases, it is difficult to arrive at a satisfactory conclusion; and it is not at all surprising that the decisions have conflicted with each other. Where the meaning of the words is clear, and there is no inconsistency in the various provisions of the will, there can be no difficulty in giving it the proper construction. In many cases words of doubtful import have acquired a meaning by legal interpretation. When that has been uniform it becomes a rule of law, and it should then govern all cases in which it is applicable; although it may be against the apparent intention of the testator; as it is better that the wishes of an individual should be defeated, in a particular instance, than that a rule of law, established for the general good, should be varied in its application.

As a general rule, it is fair to presume that a testator intends to give something absolutely to the persons named as legatees. That inference should be conclusive, unless a condition is clearly

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annexed to the gift, or can be plainly inferred. Courts of justice generally lean that way, from a disposition to carry into effect the will of the testator. (9 *Ves. Rep.* 229.) Probably the actual intent has often been defeated where it has been decided from legal construction, and not from the express words, that the legacy is contingent, but seldom if ever, where the decision has been the other way.

In the case now under consideration, the words denoting the gift are in the present tense, "I give and bequeath" the avails of the real estate; but the direction for the payment is in the future; "to be equally divided" by the executors among the legatees. The fair import of the language is, that there was a *present* gift of moneys, to be paid thereafter; the direction for a division being equivalent to a direction for the payment. (*May v. Wood*, 3 *Bro. C. C.* 47.) In such cases the interest is vested, and transmissible. (13 *Ves. Rep.* 113.) It makes no difference that the money is not payable, and could not be demanded, until a future and perhaps distant period. In some respects it is like a bond for the payment of money at a future day: it is *debitum in presenti* though *solvendum in futuro*. That the person who drew the will knew the distinction between the time of the gift and the time when it should be paid is evident from the next clause in the will, where the same words are used, "I give and bequeath unto Jacob L. Rednor the sum of fifty dollars;" and the same direction as to the payment in future, "to be paid to him by my executors whenever he shall arrive at the age of twenty-one years." That legacy clearly vested immediately after the death of the testator, although it was payable afterwards. The rule that a testator is to be deemed to have intended that the same words used in different parts of his will should convey the same interests is a sound one, and wills should be construed accordingly. There is, it is true, a difference between the two legacies here, inasmuch as the last is of money having an existence at the time of making the will, whereas the other is of avails to be raised at a future period. But that does not affect the principle. It is a right to receive the thing given, at a future period, which

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vests immediately. The change in the form or description may affect the payment, but not the right. (*Smither v. Willock*, 9 *Ves. Rep.* 233. *Hatch v. Mills*, 1 *Eden's Rep.* 342.)

No condition is annexed to the gift ; nor is there any thing to show that the testator intended that it should be contingent. There is no provision that in case of the death of either of the legatees, previous to the decease or marriage of the widow, his portion should go to his children, if he should have any, or to the survivors, if he should die childless. If the legacy should lapse, it could belong to neither. This could never have been the design of the testator. The same feeling which prompted him to make the donation to his offspring would have induced him to extend it to their children, by an express provision, had that been necessary. His mind would have revolted at the idea of their being left, perhaps at a tender age, without the means of subsistence. There can be no doubt but that the actual intention of the testator was that the right to the legacies in question should vest immediately upon his death. That intention should be carried into effect, unless it is opposed by some settled rule of law. I have not been able to discover any such ; but on the contrary the decisions, so far as they apply, favor the construction which I am disposed to give to this will.

The cases are clear that if the testator had directed that his executors should sell his lands immediately after his decease and pay the interest of the avails to his widow until her marriage or death, and then divide such avails between the legatees designated by him, the bequests to them would have vested immediately. (*Smither v. Willock*, 9 *Ves. Rep.* 233. *Walker v. Shore*, 15 *Id.* 122.) The fact that the use of the land is devised to the widow, and the sale postponed to the time of her death or marriage, cannot make any substantial difference in the rights of the legatee. Nor can the circumstance that the legacy is to be raised by a future sale of real estate vary the construction of the will, so long as the sale was postponed on account of the estate for life in the widow, and not with reference to the circumstances of the legatees. In *Bayley v. Bishop*, (9 *Ves. Rep.* 6,) William Bayley devised his lands to his wife

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during life, and at her decease to trustees to sell, and with the moneys arising therefrom to lay out £500 in the purchase of an annuity for his son Thomas during his life, which he was to be permitted to receive. Thomas died in the lifetime of the widow. The master of the rolls said, "taking this to be a pecuniary legacy, the question is whether it fails by the death of Thomas Bayley during the life of the widow. I am of opinion it does not." He lays much stress upon the position that if the wife had died before the testator, the trust must have been immediately executed, upon his death, the estate sold and the money paid, and says that it was merely on account of the estate for life in the widow, and not with reference to the circumstances of the legatees, that the sale and payment were postponed. In *Dawson v. Killett*, (1 Bro. C. C. 119,) Doctor Mitchell gave certain lands to his wife during life, and if there should be no issue between them, to the defendant, charged with £100 to William Ranscombe, and another legacy, both payable in six weeks after his wife's death. William Ranscombe survived the testator, but died in the lifetime of the widow. His executor filed a bill for the legacy. The lord chancellor said, there is a long string of cases which establish the rule that where a legacy is given out of a particular fund, with a reference to the time when it shall vest in possession, it is a distribution of the fund between the person to take at present and him who is to take in future; and the gift to him who is to take in future vests immediately. In *Godwin v. Manday*, (1 Bro. C. C. 190,) there was a devise to the testator's son after the decease or marriage of the testator's widow, with a proviso that he should pay to the testator's daughter Mary £300 within a year after the death of the widow. Mary died in the lifetime of the widow. It was decided that the legacy had vested.

In this case the payment of the legacy to Abraham Rednor was not postponed in reference to his situation or circumstances. If it had been, there would have been some direction that the money should not be paid until there had been a change in one or the other. But there is not a word to that effect in the will. On the contrary, the money was to be paid to him on the death

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or marriage of the widow, whenever that should happen, and whatever might be his situation or circumstances at the time. But the payment was postponed, as was said by the master of the rolls in *Bayley v. Bishop*, "on account of the estate for life in the widow." There may be a difference between cases where land is devised to executors at the termination of a particular estate, in trust to sell, and where they have simply a power to sell. But the technical rule relative to remainders is requisite to convey a present vested interest only in case where that is not done by the express terms of the will. Here the will is express to that effect. That too renders it unnecessary to consider whether as the property given to the legatees is the avails of the whole estate, it is not in effect equivalent to a remainder, and subject to the same rules. The case of *Sharpsteen v. Tillou*, (3 Cowen, 651,) which was cited on the argument, by the plaintiff's counsel, is inapplicable. The bequests which came in question there were not of the whole fund which had been given to another for life, nor, as was observed by the counsel for the prevailing party, was it necessary to decide the question whether such legacy was vested or contingent, as it could make no difference in the decision of the case. Consequently the question was not much discussed by the counsel, or considered by the court, and the opinions of the supreme court and of the chancellor not being upon a point essential to the decision of the case, cannot have any controlling influence here.

Upon the whole, my opinion is that the legacy of the one-sixth part of the avails of the testator's real estate to Abraham Rednor, payable when such real estate should be sold, vested in him immediately upon the death of the testator, and that the plaintiffs not being his heirs at law, or next of kin, have no interest in such legacy.

The bill must be dismissed with costs to the executors, but not to the other defendants.

DUTCHESS GENERAL TERM, September, 1847. *Strong,
Morse, and Barculo*, Justices.

OLMSTED *vs.* HARVEY.

Where lands are devised to a person, in general terms, without words of limitation or perpetuity, the devisee takes but a life estate; unless the will contains something manifesting an intention on the part of the testator, to convey a greater estate than that embraced in the legal import of the terms of the devise.

In construing wills, a different principle prevails from that which is applicable in the construction of other instruments.

In regard to wills, courts are permitted to look beyond the mere phraseology of the devise, and gather the intention of the testator from the whole instrument. And if the context discloses an intention differing from that derived from the technical effect of the words of the particular devise, the former must prevail. And thus a devise, without words of limitation, which, standing alone, gives a life estate, may be enlarged into a fee, by other parts of the will showing a clear intention to dispose of the whole estate. For the intention of the testator is the law of devises.

In ascertaining this intention, however, courts are governed by the principles which have been settled in adjudged cases.

The law is well settled that introductory words in a will may be accepted as explanatory of what follows, *juncta jurant*; but of themselves, they are never sufficient evidence of an intention to convey the whole estate.

And in all the cases where the estate given by the will has been enlarged by the courts, by implication, it has been done upon other words which, of themselves, without the introduction, would be sufficient to imply an intention to give the fee.

The true rule is that the introductory clause does not have the effect to enlarge the estate devised, unless the words of disposition, in the clause of devise, are connected, in terms, or sense, with the introductory clause, and import more than a mere description of the property.

The circumstance that a testator gives to his sons a remainder in real estate, after the expiration of the life estate of the widow, is no evidence of his intention to give them the fee.

Where land is devised indefinitely, and the devisee is directed to pay a gross or annual sum, he takes a fee. This rule is founded upon the ground that unless the devisee takes a fee, he might not live long enough to reimburse himself the amount of the charge; and therefore he might be injured by accepting the devise. And it applies to all cases of possible loss.

Where the land is charged *in the hands* of the devisee, with a sum to be paid, or a duty to be performed, by the devisee, which may require a greater than a life estate, he takes a fee.

This rule is applicable to those cases in which the devisee is required, as a condition

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of the devise, to pay the testator's debts ; or to pay legacies and funeral expenses ; or to pay an annuity to a third person ; or whenever the will imposes upon the devisee, *in respect to the land*, a duty which requires that he should take a fee. Where the charge is on the land, simply, the devisee takes but a life estate.

THIS was an action of ejectment, tried at the Columbia circuit, in September, 1846, before Whiting, circuit judge ; who directed a verdict for the plaintiff subject to the opinion of the supreme court, on a case containing the following facts :

The plaintiff is a daughter of Nathaniel Olmsted, who died in 1821, leaving a last will and testament, upon the construction of which the question in this case arises : and also leaving his widow, and four children, viz. Nathaniel, Joseph Washburn, Mary, and Anna. Nathaniel Olmsted, jun., died in 1835, and Joseph Washburn Olmsted died in 1837, and the widow died in 1845. The will first provides for the speedy payment of the testator's debts, and then proceeds as follows :

" Second, I order and direct that my real and personal estate be divided and distributed as hereinafter directed, which is as follows, viz. I give and bequeath unto my beloved wife, Sylvia Olmsted, the use and occupancy of the home farm, (so called,) containing about one hundred acres, with the buildings thereon ; as also, she the said Sylvia Olmsted to have the use and occupancy of the Bartlett lot, (so called,) which described lands as aforesaid is to remain in the possession of the said Sylvia Olmsted so long as she remains my widow and no longer. But at the decease of the said Sylvia Olmsted, the above described land and buildings are to be equally divided between my sons Nathaniel Olmsted, junior, and Joseph Washburn Olmsted. I give and bequeath to my son Nathaniel Olmsted, junior, the lot of land that I purchased of Jacob Powers, containing fifty acres or more, and he the said Nathaniel to come in the possession of the same immediately after my decease. I also give and bequeath to my son Nathaniel Olmsted, junior, the mountain lot of land, (so called,) containing about fifty acres, and the said Nathaniel to come into possession of the same immediately after my decease. I give and bequeath to my son Joseph Washburn Olmsted one thousand dollars, to be paid to him

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when he arrives to the age of twenty-one years, the said thousand dollars to be paid out of my personal estate, (should there be a sufficiency left after the sums bequeathed hereafter to Anna Olmsted and Mary Olmsted.) I give and bequeath to my daughter Anna Olmsted two hundred dollars, to be paid to her out of my personal property within one year from my decease. I give and bequeath to my daughter Mary Olmsted three hundred dollars, to be paid out of my personal property in one year from my decease. I order and direct that, after my decease and a legal estimation shall be made of personal estate, (after deducting all my debts and the legacies to Anna Olmsted and Mary Olmsted as aforesaid,) shall not amount to the sum of one thousand dollars, being the sum by me bequeathed to Joseph Washburn Olmsted, then in that case, the said Joseph Washburn Olmsted shall be paid in land, (from the Powers lot, so called,) to be appraised by my executors hereinafter named, so as to make to him the sum of one thousand dollars.

“And I do most sincerely and solemnly enjoin it upon my executors hereafter named, to see and take care that this my will be religiously fulfilled in all respects, according to the true intent and meaning thereof. But in case any dispute should arise respecting any gift, bequest, matter or thing contained in this instrument, then in that case the same should be referred to three impartial and intelligent men of the town of Canaan, known for their honesty and integrity, each party choosing one, and those two choosing a third; which three men thus chosen shall, unfettered by law and the niceties of legal construction, declare their sense of the testator's intentions, and their decision to be binding on the parties the same as would be in any court of record in the United States.”

It appeared in evidence that Joseph Washburn Olmsted became of age before his death, and that the personal estate was insufficient to pay his legacy of \$1000; the deficiency amounting to \$609.69. This amount was paid to him by Nathaniel, who conveyed to him certain lands in satisfaction of the legacy, and received from Joseph a release of all his right, title and interest of, in and to the said lot called the Powers lot. Nathaniel

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Olmsted, jun. conveyed the premises in question in this suit—being the lot described in the will as the mountain lot, containing about fifty acres—to the defendant, by warranty deed, dated 18th September, 1826.

H. Hogeboom, for the plaintiff. 1. The plaintiff is entitled to judgment for the premises claimed, as the heir at law of Nathaniel Olmsted. The will of the testator only created a life estate in his son Nathaniel. (2 *Preston on Estates*, 67, 194, and the cases there referred to. 14 *Serg. & Rawle*, 84. 1 *Price*, 353. 2 *Tay. Prec. of Wills*, 291, n. 8 *Petersd. Abr.* 145, 205. 18 *Wendell*, 200. 13 *Id.* 582. 23 *Id.* 452. 20 *Id.* 576. 21 *Id.* 463.) 2. The intention of the testator must be collected from the words he has used; and whenever the words have received a judicial construction it must be adhered to. (8 *Pet. Abr.* 87, 88, n. 5 *Cowen*, 221.) 3. There must be words of inheritance or perpetuity to pass the fee. (8 *Pet. Abr.* 145, 205. 23 *Wend.* 452. 21 *Id.* 463. 13 *Id.* 578.) 4. If the introductory clause of a will evinces the intention of the testator to dispose of all his worldly estate, it has not the effect to enlarge the estate devised, unless the words of disposition in the clause of devise are connected in terms or sense, with the introductory clause. (20 *Wend.* 576. 8 *Pet. Abr.* 153, 106, 157, 125.) 5. Under this will the son, (Nathaniel,) could not take a fee by implication, as there was no charge imposed on account of the devise. And if there had been a personal charge, and no words of perpetuity in the will, he could not take the fee by implication. (13 *Wend.* 578. 21 *Id.* 462. 8 *Pet. Abr.* 162.) 6. A devise of real and personal estate subject to debts to be paid out of the personal property, and if that is not sufficient, then out of the real, only creates a life estate. (8 *Pet. Abr.* 164, 205.) A devise creating a charge upon the land does not carry the fee. (2 *Black. Com.* 84 to 86, and notes.) 7. The words in the will under consideration in relation to his real and personal estate “to be divided and distributed,” cannot pass the fee. In the case of *Spraker v. Van Alstyne*, (13 *Wend.* 582,) it was insisted by the defendant’s counsel that the words directing certain lands

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to be equally divided between the testator's sons, carried the fee. But the supreme court took no notice of the point; and when the case was subsequently argued in the court of errors, the defendant's counsel did not make that point. (*See 18 Wend. 200.*) The words "all my lands freely to be possessed and enjoyed," only creates a life estate. The court said the words might mean "freely to be enjoyed against the heirs, but they cannot give them so extended a meaning," (*23 Wend. 452.*) 8. The heir at law cannot be disinherited, unless such is the plain and manifest intention of the testator. (*8 Petersd. Abr. 91, 110.*)

K. Miller, for the defendant. The defendant claims that his grantor was seised under the will of Nathaniel Olmsted the testator, of a fee estate in the premises in question, and which passed from the devisee to the defendant, by his deed of September 18, 1826. 1. The will, in express terms, orders and directs that the testator's real and personal estate shall be divided and distributed as therein after directed. (*Jackson v. Merrill, 6 John. 191. Carr v. Jennerett, 2 McCord, 66. Morrison v. Semple, 6 Binney, 94. Hungerford v. Anderson, 4 Day, 68. Denn, ex dem. More, v. Mellen, 5 T. R. 562. 3 Call's Rep. 265. Brown v. Wood, 17 Mass. 72. Fox v. Phelps, 20 Wend. 445.*) 2. There are no words of perpetuity used in any part of the will, and no devise of any reversionary interest or estate. (*See Spraker v. Van Alstyne, 18 Wend. 207, per Walworth, chancellor.*) 3. The devise to Nathaniel Olmsted, jun. and Joseph W. Olmsted, of the homestead farm and Bartlett lot, after the decease of the widow, (who had a life estate,) being a remainder interest, shows most clearly that the testator intended that they should take a fee estate. (*Butler and wife v. Little, 3 Maine Rep. 239. 2 Prec. of Wills, 291, 292. Oates v. Cook, 3 Burrows, 1684. See 3 Bing. 3, 13. 1 Ves. sen. 491.*) 4. The devises to Nathaniel, of the Powers and mountain lots, passed a fee; as the Powers lot is expressly charged with the deficiency that should or might arise, (after the application of his personal estate to his debts and other legacies,) to pay the

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legacy of \$1000 to Joseph W. (*Spraker v. Van Alstyne*, 18 Wend. 204, 209. *Cook v. Holmes*, 11 Mass. 528. *Doe v. Richards*, 5 T. R. 356. *Denn, ex dem. More, v. Mellen*, 5 Id. 562. *Doe v. Allen, arguendo*, 8 Id. 499.) 5. The whole tenor, and particularly the concluding clauses of the will show that the testator did not intend that the disposition should be fettered by any niceties or technicalities of legal construction. And as in no part of the will are words of perpetuity used, the court will feel themselves bound to say he intended to have the devisees take a fee estate.

By the Court, BARCULO, J. The plaintiff claims the one equal fourth part of the premises in question as heir at law of Nathaniel Olmsted the elder, on the ground that the devise of the mountain lot to Nathaniel Olmsted, jun., gave him but a life estate. The defendant contends that the latter took an estate in fee, which he conveyed, by the deed of 1826, to the defendant. The question, therefore, depends solely upon the construction to be given to the will. As the testator died before the revised statutes went into effect, the will must be interpreted by the rules of the common law prevailing at the time of his death.

In the first place, it is quite clear that the language of the devise itself is insufficient to carry the fee. If the same or similar words were used in any other instrument than a will, no one would pretend that they conveyed any thing more than a life estate. But, in regard to devises, a different principle of construction obtains. The court is permitted to look beyond the mere phraseology of the devise, and gather the intention of the testator from the whole will. If the context discloses an intention differing from that derived from the technical effect of the words of the particular devise, the former must prevail: and thus a devise, without words of limitation—which standing alone gives a life estate—may be enlarged into a fee by other parts of the will, showing a clear intention to dispose of the entire estate. For the *intention of the testator* is the law of devises. (*Ram on Wills*, 1, 109.) It is his *will* that is to be carried into effect.

In ascertaining this intention, however, the courts are gov-

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erned by the principles which have been settled in adjudged cases. In the language of Lord Kenyon, "It is our duty, in construing a will, to give effect to the devisor's intention, as far as we can consistently with the rules of law ; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning : that would be, as Lord King and other judges have said, removing landmarks ; but if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear, and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases which tend only to involve the question in obscurity." (6 T. R. 352.) Wherever words have received a judicial determination, the security of titles requires that such construction be adhered to. (*Jackson v. Luquere*, 5 Cowen, 221.)

This rule, which subjects wills to the authority of previous decisions, is undoubtedly a salutary one ; for otherwise, if each court was permitted to apply a conjectural interpretation to these instruments, every estate given by will would be insecure until the will had been expounded by the highest court having cognizance. Still, it cannot be denied that the rule conflicts, in some degree, with the literal terms of the former doctrine—that *the intention of the testator is the law of devises*. For it has been conceded and regretted by judges, from the days of Lord Mansfield to the present time, that the doctrine of *stare decisis*, when applied to devises without words of inheritance, has, in most cases frustrated the *actual intention* of the testator. (See the remarks of Lord Mansfield in *Loveacres v. Blight*, Cowper, 352 ; and of Chancellor Walworth, in the case of *Spraker v. Van Alstyne*, 18 Wend. 200.)

So manifest had this become, that the legislative power has been compelled to interfere and change the rule of construction, in such cases, not only in this and some of the neighboring states, but also in England. (1 R. S. 57, § 5. *Laws of Penn.* 1833, p. 249. *Purd. Dig.* 971. 1 Vict. c. 26, § 28.) In the

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case before us, the lands were devised to Nathaniel Olmsted, jun. without words of limitation or perpetuity; and according to the authorities, he took but a life estate; unless something else can be found in the will manifesting an intention on the part of the testator to convey a greater estate than that embraced in the legal import of the terms of the devise.

The defendant's counsel relies mainly upon the following grounds: 1. The introductory clause in the will. 2. The want of words of perpetuity. 3. The devise being of a remainder interest. 4. The charge upon the Powers lot. In regard to the first point, it is contended that the words "I order and direct that my real and personal estate be divided and distributed as hereinafter directed, which is as follows," manifest an intention to dispose of the whole estate in fee. But it is obvious that these words may be applied to a division and distribution of the estate for the lifetime of the devisees. No clear and certain intent can be gathered from this clause, standing by itself. For, the estate is to be divided and distributed *as hereinafter directed*, making the introduction depend upon the *subsequent directions*.

The law is well settled that introductory words in a will may be accepted as explanatory of what follows, *juncta juvant*; but of themselves they are never sufficient evidence of an intention to convey the whole estate. (*Ram on Wills*, 65.) The books contain many cases in which this rule has been recognized, and applied to wills containing words of similar import to those in the present will. Thus, in the case of *Doe v. Buckner*, (6 *Term Rep.* 610,) the words were "as to my estate and effects, both real and personal, I give and dispose thereof in manner following." In *Denn v. Gaskin*, (*Cowp.* 657,) the words were "as to all such worldly estate as God has endued me with, I give and bequeath as follows." (*Vide also Hogan v. Jackson*, *Cowp.* 299; *Wright v. Russell*, *Id.* 661; *Doe v. Wright*, 8 *Term Rep.* 64; *Roe v. Vernon*, 5 *East.* 51; *Goodright v. Barron*, 11 *Id.* 220.)

In the case of *Loveacres v. Blight*, (*Cowp.* 352,) where the introductory clause was: "As touching such worldly estate,

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wherewith it hath pleased God to bless me in this life, I give, demise and dispose of the same in the following manner and form." Lord Mansfield observed, "though the introduction of a will, declaring that a man means to make a disposition of *all his worldly estate*, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do *alone*. And all the cases cited on the argument to show that the introductory words in this case would alone be sufficient, fall short of the mark; because they contained other words clearly manifesting the intention of the testator to pass a fee."

Although the courts agree that the introduction may be used to assist in discovering an intent to pass the fee, yet in all the reported cases, (unless one or two decisions in our own courts may be deemed exceptions,) where the estate has been enlarged by implication, it has been done upon other words, *which of themselves*, without the introduction, would be sufficient to imply an intention to give the fee.

The only sound rule on this subject, I apprehend is laid down by Chief Justice Nelson, in *Barhydt v. Barhydt*, (20 Wend. 576,) viz. that the introductory clause has not the effect to enlarge the estate devised, unless the words of disposition in the *clause of devise* are connected, in terms, or sense, with the introductory clause, and import more than a mere description of the property. It is hardly necessary to add that such connection is not found in the case before us.

The defendant's counsel contends that the fact that the testator did not use any words of perpetuity, nor devise any reversionary interest, shows an intention to convey a fee by the devise in question; and cites the opinions of the chancellor and senator Dickinson, in *Spraker v. Van Alstyne*, (18 Wend. 207, 211.) In regard to that case, it is to be remarked, in the first place, that the decision was evidently based upon the principle that the devisee was personally charged with the payment of the testator's debts, in respect to the land devised to him. It is, however, undoubtedly true that both of the

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learned members of that court who delivered opinions, intimate that the circumstance of there being no express disposition of the inheritance, tended strongly to show, in that case, an intention to convey it by a clause without words of perpetuity.... "The will," says Senator Dickinson, "is clothed with various special and minute provisions; the support of his wife, the discharge of a bond, the payment of legacies to his granddaughters, &c. And even the disposition of his wearing apparel is made the subject of special provision. Is it then reasonable to suppose that the testator seriously intended to leave the lands devised to Martin undisposed of, except for the term of a single life?"

It seems to me, however, that this mode of reasoning is at war with the unbroken line of decisions in the English and American courts for the last century. If allowed, it could be applied to, and would control, almost every case in which the question is raised. It might well be asked in every case where a man sits down to write a will, if it is reasonable to suppose he does not intend to dispose of his whole estate. There is no doubt that this is the intention in ninety-nine cases in every hundred. And if courts were permitted to take this intention, thus ascertained, there would probably never be another case where the heir of a testator, as heir, would take any thing. The cases on this subject all involve, from their very nature, the apparent absurdity of a testator making a will and yet not devising, perhaps, the principal portion of his estate. The case of *Wheaton v. Andrews*, (23 Wend. 452,) is an authority against the defendant on this point. There the will was in these words: "As touching such worldly *interest* as it hath pleased God to bless me with in this life, I dispose of the same in manner and form following, that is to say: In the first place, I give and bequeath unto Prudence, my well beloved wife, all my lands and tenements, buildings of whatever kind, with all the appurtenances thereunto belonging, by her freely to be possessed and enjoyed; and likewise all my chattels, or any kind of movables, together with all and every my household furniture. 2d. I give and bequeath to the above named Pru-

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dence, all my wearing apparel." The testator left no children. In that will there were no words of limitation ; no devise of the inheritance ; yet the testator bequeathed all his personal chattels, and even his wearing apparel. These bequests are in the same language as the devise of his real estate ; and it is highly probable that he intended to convey an equally absolute estate in both. For, as observed in the case of *Hogan v. Jackson*, "common sense alone would never teach the difference" between the modes of "giving a person a horse and a quantity of land." Nevertheless, the supreme court held in that case that the devisee took only a life estate.

It is contended on the part of the defendant that inasmuch as the two sons were given the remainder, after the expiration of the life estate of the widow, the testator must have intended to give them the fee. I am not aware of any such rule of construction. It is by no means unusual to limit one life estate after another ; and I see no reason why the same language that would give a life estate in the first instance, will not also add a second life estate to a preceding one. The authorities are to this effect. (*Hay v. The Earl of Coventry*, 3 T. R. 83. *Hackley v. Mawbey*, 3 Bro. C. C. 82. *Right v. Compton*, 9 East, 267.) Mr. Powell thus sums up the authorities on the foregoing points : "Nothing is better settled than that a devise of messuages, lands, tenements, or hereditaments (*not estate*) to a person, without words of limitation, confers on the devisee an estate for life only, notwithstanding that the testator have used expressions in the introductory part of the will denoting an intention to dispose of his whole estate, or have given a nominal legacy to the heir, or the will contain declarations of an intention wholly to disinherit him, or there be an antecedent devise to him for life of the property in question, or the devise be to a class embracing the heir, as to children ; or, lastly, though there be in another part of the will, or in the immediate context, devises *expressly for life*, raising the presumption, therefore, that the testator meant something different by an indefinite devise ; though any, or it is conceived, *all* of these circumstances concur, in the same will, it is indisputably

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clear that such a devise will confer only an estate for life." (2 *Powell on Devises*, 377.) The only remaining question to be considered is, whether the charge upon the "Powers lot" is of such a nature as to pass a fee by implication. The rules on this subject are quite clear. 1. Where land is devised indefinitely, and the devisee is directed to pay a gross or annual sum, he takes a fee. 2. Where the land is charged, *in the hands* of the devisee, with a sum to be paid or a duty to be performed, by the devisee, which may require a greater than a life estate, he takes a fee. 3. Where the charge is on the land, simply, the devisee takes but a life estate. The first of these rules is founded upon the ground, that unless the devisee take a fee, he might not live long enough to reimburse himself the amount of the charge; and therefore he might be injured by accepting the devise. It applies to all cases of *possible loss*. The second rule is applicable to those cases in which the devisee is required, as a condition of the devise, *to pay the testator's debts*; or *to pay legacies and funeral expenses*; (*Doe v. Holmes*, 8 T. R. 1; *Doe v. Stevens*, 5 East, 87;) or to pay an annuity to a third person; (*Shailard v. Baker*, Cro. Eliz. 744;) or wherever the will imposes upon the devisee, *in respect to the land*, a duty which requires that he should take a fee. It is quite plain that the devise in question does not come within the first rule, as Nathaniel is not directed to pay any gross or annual sum; nor within the second, for *he* is not directed to pay the deficiency in Joseph's legacy. It falls within the third rule. The Powers lot is given to Nathaniel, charged with the payment of a legacy to Joseph, of \$1000, or so much thereof as the personal estate should be insufficient to pay. The balance is to be paid to Joseph *in land*; to be appraised by the executors. The evident intention of the testator was, that in case of a deficiency of the personal estate, the executors were to set apart to Joseph so much of the Powers lot as they should appraise to be equal in value to the amount of the deficiency. That portion of the land Joseph would probably hold in fee; although it is not necessary to decide that point at present. The residue of the land would remain in Nathaniel for life. Here there is no

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possibility of loss to him, by accepting the devise. The worst that can happen, for him, is that the whole lot may be taken to satisfy the legacy. Nor is there any duty imposed upon him which requires that he should take a fee. *He* is not required to pay the deficiency; it is to be taken out of the lot, without his aid or co-operation. It is a mere charge upon the land; subject to which he takes the devise; and the authorities are abundant to show that such words do not enlarge the estate to a fee by implication. (*Dickins v. Marshall*, Cro. Eliz. 330. *Mason v. Blackmore*, 2 Atk. 341. *Doe v. Allen*, 8 T. R. 497. *Doe and Jackson v. Ramsbottom*, 3 Maule & Selw. 516.)

Upon the whole, we think that the will gave Nathaniel only a life estate in the premises, and therefore that the plaintiff is entitled to recover.

Judgment for the plaintiff.

Barber.
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166a 187

SAME TERM. *Before the same Justices.*

WOOD and others *vs.* PERRY and TORREY.

Separate purchasers of different parcels of the same lot cannot join in a bill against the former owner, to restrain the prosecution of separate ejectment suits commenced by him against the complainants.

Nor can they unite in a bill against such former owner, to compel the performance of a prior contract for the sale and purchase of such lot, between the former owner and another person, upon the ground that such prior contract has been assigned to one of the complainants, as well in his own behalf as to protect the interests of his co-complainants; where there is nothing, beyond the averment in the bill, to show that the purchase or transfer of such contract was for the benefit of all the complainants, or was made at their request, or with their assent.

Persons having distinct claims against another, arising upon separate and independent contracts, cannot join in a bill to enforce such claims; where there is no proof of a common interest in the subject matter.

To allow persons having distinct claims against the same individual to maintain a joint suit against him merely because the act of one may, if valid, incidentally prove beneficial to the others, might be productive of great oppression and injustice.

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Whenever a tender is made, and is insisted on in the pleadings, the creditor is at least entitled to the amount tendered.

Where the debtor admits a certain amount to be due, by making a tender thereof, it is not a point at issue between the parties, so far as he is concerned; and the creditor is not required to establish the amount by proof.

It is well settled that a written contract may be waived by parol. And after a contract has been thus waived by one of the parties, neither he nor any one acting under him can resuscitate it.

Although courts of equity often give relief where there has been a failure in strictly complying with the terms of a contract, yet that is only done where there is some excuse for such failure. Relief is never granted to a purchaser where the failure has arisen from a determination on his part to abandon the contract, and where the vendor has acquiesced in such abandonment, and has in consequence made an agreement to sell the land to another purchaser, and has put him in possession of the property.

An assignee of a contract takes the same subject to all existing equities in favor of the other party, against the assignor; although such assignee may not have received any notice of them at the time.

A purchaser of land has a right to buy up a prior contract between his vendor and another person for the sale of the land, with a view of extinguishing an outstanding incumbrance, and charging the vendor with the consideration money. But he has no right to procure such contract for the purpose of defeating the title under which he claims, and under which he is in possession of the land. That the law will not, and ought not to, tolerate.

IN EQUITY. This case came before this court on an appeal by the defendant Perry, from a decree of the late vice chancellor of the seventh circuit. The bill was originally filed against Abner Perry, alone, to obtain injunctions against the further prosecution of three actions of ejectment instituted by him, one against the plaintiffs Benney, and one against each of the other plaintiffs, and to compel the performance of a contract between Perry and one Smith D. Mallory, for the sale of lot No. 37 in Savannah, in the county of Wayne, so far as it related to the parts of that lot which were in the possession of the plaintiffs, respectively. The bill averred that Wood had purchased the contract as well in his own behalf as to protect the interest of his co-plaintiffs. It also set forth that Royal Torrey had once had a claim against the premises, which had not been formally extinguished. Perry demurred to the bill on the grounds that it did not set forth any common interest of the plaintiffs in the subject matter in dispute, and that Torrey had

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not been made a party. The demurrer was argued before the late assistant vice chancellor of the first circuit; who decided it against Perry, on the first ground, and in his favor on the second. The bill was then amended by making Torrey a party. Perry answered, but the bill was taken as confessed by Torrey. Abner Perry died soon afterwards, and it was agreed by the parties to substitute his widow, Fanny Perry, to whom he had devised the premises in dispute, as a defendant. An order was obtained by the plaintiffs for the examination of Torrey as a witness; and he was examined accordingly. Much other testimony was taken in the cause. The following is a brief summary of the facts; some of which are more particularly detailed in the opinion of the court.

In 1824, Torrey was in possession of the lot, under a contract of sale to him by Fellows & McNab, the then owners, on which contract he had paid them \$50. Being unable to comply with the terms of the contract, he induced Perry, who was friendly to him, to take an assignment thereof, and purchase the lot. Perry paid the purchase money and took a deed in fee from the then owners, to himself, for the whole lot. Pursuant to an understanding between Perry and Torrey at the time, they entered into a contract for the sale of the lot by Perry to Torrey. Torrey had built a house on the lot previous to Perry's purchase, and occupied it by his tenant (Dowd) until about the 26th of November, 1834. But he had failed in the performance of his contract, and Perry considered it at an end. On the day last mentioned Perry entered into a written contract with Mallory, called in the proceedings in this suit, "the Mallory contract," by which Perry agreed to convey the lot to Mallory, by a warranty deed, when he should be paid for it as follows, that is to say \$2750, payable \$200 in one year from such date, and \$200 in one year thereafter, which was to be applied first in payment of the interest and then in reducing the principal; and the residue in six annual payments thereafter, with interest. The deed to be executed when the amount due should be reduced to \$2000; for which sum a bond and mortgage on the place were to be executed by Mallory.

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And until such bond and mortgage should be executed, none of the valuable pine timber should be cut, except such as might be necessary for the buildings on the premises. Possession was to be given to the purchaser within one month from the date of the contract. Mallory took partial possession of the dwelling house within that time: but after remaining there three days he relinquished it, and told Dowd, the former tenant, that he might return, as he, Mallory, had abandoned the contract, and should have nothing more to do with it. Dowd accordingly returned—Mallory assisting him to remove his things back. Nevertheless, Mallory, on the 23d of February, 1835, assigned the contract to one Leonard, for a nominal consideration. Leonard then removed some of his furniture into the house, and Dowd went out. Leonard's property was soon afterwards moved out, (how, it did not appear,) and he, shortly after that time offered to re-assign the contract to Mallory, saying that he in his turn had abandoned it. Torrey then put another person in possession, and applied to Perry for another contract. On the 11th of December, 1835, they made a new contract in writing for the sale of the land by Perry to Torrey for \$2857, to be paid on the first days of November, 1839, 1840, and 1841, with interest, to be secured by a mortgage on the premises and on other land of Torrey. The deed and mortgage to be made out without delay. No such deed or mortgage have ever been executed. Torrey was then, and continued thereafter, in possession of the lot. On the 4th of July, 1838, Perry, in pursuance of an intermediate arrangement between him and Torrey, conveyed 225 acres of the lot to Thompson and Godfrey, in fee, and received from them their bond and mortgage on the same for \$1500. They paid the remainder of the consideration money, amounting to \$875, to Torrey, who retained it for his own use. Torrey remained in the occupancy of the other parts of the lot until he disposed of the same to the plaintiffs. On the 3d of September, 1838, he made a written agreement with the two Benneys, whereby he contracted to sell and convey to them 68 acres of the remaining part of the lot; the deed to be executed when he should receive \$476 and interest as therein

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mentioned. They paid him \$100 on the same day, and subsequently, three years interest; and the time for paying the residue was extended by Torrey, to the 3d of September, 1844. The \$100, and all the interest paid, were retained by Torrey. The Benneys took possession of the 68 acres. Torrey subsequently sold an undefined portion of the residue of the lot to Wood, with the privilege of occupying the whole for a time, and then to take a deed for 100 acres, or to occupy the whole until he should be paid for his improvements. And after that he sold half an acre to Palmer for \$50, with the privilege of taking another half acre on the same terms; and received from him, and retained, the \$50. Palmer went into possession of the two half acres. Torrey testified that these contracts with the plaintiffs were subsequently reported to, and approved by, Perry; who promised to execute the necessary conveyances. Perry, however, denies this. And one of the plaintiffs' witnesses, (Thompson,) testified that Perry instructed him to make inquiries on the subject, and not to sanction the contracts unless he, Perry, should be safe for the residue of the money due to him. It seems that he had also become apprehensive that Torrey had obtained the control of the Mallory contract, and he therefore told Thompson that if he found that Torrey intended to make him trouble on that contract, any deed which he should give to Wood must be subject to it. After Thompson had made inquiries, he made such a report to Perry that he refused to execute deeds to the plaintiffs, and subsequently instituted the actions of ejectment for the parts of the lot in their possession.

Leonard, after abandoning the Mallory contract, removed to the state of Ohio. On the 11th of June, 1836, he assigned that contract to one Uriah Roraback, who went to the state of Ohio to obtain it, for \$25. This appears to have been for the benefit of himself, William H. Adams, and Mark H. Sibley. Adams and Sibley each made tenders of the money which they supposed to be due on the contract, and offered a mortgage for the remainder, to Perry, and requested him to execute a deed for the lot. He, however, declined to receive the money, and refused to execute a deed. The plaintiffs allege that he then

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recognized the existing validity of that contract; but this is denied by the defendant Perry. The substance of the proof on that subject is mentioned in the opinion of the court. The contract was assigned by Roraback to Sibley on the 6th of July, 1836; the consideration mentioned in the assignment is \$100. After Thompson had communicated to Wood what Perry had said about this contract, and his refusal to convey to Wood, he (Wood,) applied to Sibley for the purchase of such contract for himself, and as the plaintiffs allege, to protect the other plaintiffs. Sibley conveyed to him by an assignment, dated June 23d, 1843. The consideration expressed in the assignment was one dollar. Sibley testifies that he actually received from Wood \$200, but he refused to insert that amount in the assignment, and expressly stipulated that it was to be without recourse to him. It does not appear whether the last assignment was before or after the commencement of the actions of ejectment. On receiving the assignment, and after the commencement of the suits in question, Wood contending that, under the circumstances, he had a right to enforce the Mallory contract, tendered to Perry \$606 absolutely, and \$200 more if it should be found due, and claimed a deed for all the lot not included in Thompson and Godfrey's purchase. Perry refused, and the plaintiffs thereupon commenced their suit in the court of chancery. The vice chancellor decreed that upon Wood's paying or tendering to the defendant Perry, within twenty days, the sum of \$515,37, she should execute a deed to him for all the lot not included in Thompson and Godfrey's purchase; that Torrey should execute a quit-claim deed to Wood for the same premises; that Wood should thereupon convey to his co-plaintiffs the portions of the lot purchased by them, on his being paid the balance due on their contracts; that the defendant Perry, and her representatives, should be perpetually enjoined from further prosecuting the actions of ejectment already instituted, and from commencing any other suit against the plaintiffs or their representatives, for the parts of the lot held by them respectively; and that the defendant Perry should pay the complainants' costs.

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W. H. Seward, for the complainants. 1. Henry W. Wood has an interest in all the lands mentioned in the bill of complaint, and in each of the parcels thereof, and in the contracts by which the same are held in possession by himself and the other complainants respectively. 2. All the complainants are necessarily and properly complainants in this suit. 3. The bill is not multifarious. 4. Royal Torrey ought not to have been made a party to the bill. 5. The bill shows a good and sufficient cause for relief against the defendants.

George Rathbun, for the defendants. 1. The plaintiffs show no common interest in the subject matter of this suit, and are therefore improperly joined. 2. The complainants have failed to prove the case stated in the bill. The contract with Wood, as proved, is different, in every particular, from that stated in the bill. 3. The Mallory contract was abandoned by him before assignment, and he surrendered the possession of the premises to Perry, who acquiesced in the refusal of Mallory to fulfil his contract, and Perry soon after executed to Torrey a new contract for the whole lot. The Mallory contract is therefore void. 4. Torrey was interested in the suit, and was incompetent to testify for the plaintiffs. He is also impeached, and is not entitled to credit. 5. The plaintiffs are not entitled to a specific performance, because they have failed to prove the contracts stated in their bill, and because they have not performed, or offered to perform, on their part.

STRONG, P. J., delivered the opinion of the court. The objection raised in behalf of the defendant Perry, that there is not a common interest in the plaintiffs in the subject matter of the suit, sufficient to enable them to join in their complaint and prayer for relief, is settled, so far as it relates to the allegations in the bill, by the decision of the assistant vice chancellor of the first circuit on the demurrer. As there has been no appeal from his decree, the same is conclusive, so far as it goes, upon the parties in this suit. But that does not preclude Perry from subsequently raising the question of fact, either by plea or an-

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swer. She has done so by her answer, and claims the benefit of the objection, with the like effect as if it had been formally pleaded. This rendered it incumbent upon the plaintiffs to prove such common interest. If the question had turned upon the contracts made between Torrey, either in his own behalf or as agent for Abner Perry, and the plaintiffs, the objection would have been fatal. Those contracts, as set forth in the bill, and so far as the proofs go, were separate and distinct. Each of them must stand upon its own ground. There was no connection whatever between them. Mr. Justice Story says, in his Commentaries on Equity Pleading, "If an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and therefore there should be a distinct bill upon each contract." (*Story's Eq. Pl.* 226, § 272.) But the bill, although it sets out each contract very fully, does not base the plaintiffs' claim for relief upon them. It sets up a prior contract between Abner Perry and one Mallory, and claims that the plaintiffs are entitled to the benefit of it, under an assignment of such contract made to the plaintiff Wood, "to protect himself and his co-plaintiffs." The assistant vice chancellor says, "The purchase and transfer of that contract having been made to Wood for the protection, and thus for the benefit, of all the complainants, they have a common interest in enforcing it against the defendant." But there is nothing, beyond the insulated averment in the bill, to show that the purchase, or transfer, of that contract was for the benefit of all the plaintiffs. There is no proof that either of the Benneys, or Palmer, ever requested Wood to make the purchase for their protection, or knew that he intended to make it at all, nor that they contributed or agreed to pay any part of the purchase money, nor that there was any subsequent agreement between them that it should be for their common benefit, or that Wood should receive from his co-plaintiffs any part of the money which he had expended. Nor does it any where appear that any of the plaintiffs, other than Wood, ever applied

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to Perry to give either of them a deed under the Mallory contract, or that they at any time authorized Wood to make such application in their behalf. On the contrary, Wood made the purchase without any consultation with the others, paid the consideration money out of his own funds, took the assignment in his own name, made a tender with his own money of the balance which he supposed to be due under the contract, and claimed the execution of a deed to himself. If Wood is entitled to any benefit under the Mallory contract, there is nothing beyond the averment in the bill to show that the other plaintiffs have any right to participate in it. In this respect, the case differs from *Fellows v. Fellows*, (4 Cowen's Rep. 682,) and other similar authorities. There is no proof of any common interest in the subject matter. To allow persons having distinct claims against the same individual to maintain a joint suit against him, merely because the act of one may, if valid, incidentally prove beneficial to the others who had nothing to do with it, might be productive of great oppression and injustice. We have seen no case which goes to that extent. The cases have gone far enough, and should not be extended. It might be difficult for a single individual, however meritorious a defence he might have, to resist a powerful association formed against him. The complainants having failed to prove a common interest in the subject matter of the suit, the bill should for that cause be dismissed.

But it is not necessary, nor are the court inclined, to base their decision in this case solely upon that ground. There are others equally fatal to this suit.

The plaintiffs place great reliance upon the testimony of the defendant Torrey, who was examined as a witness for them, under an order of the late vice chancellor of the seventh circuit. The counsel for the defendant Perry contends that Torrey is interested in the event of the suit, and that his interest is in favor of the plaintiffs, and that therefore he is an incompetent witness for them. The order very properly restricts his examination to any matter in which he is not interested, and makes his testimony subject to all just exceptions. The effect of the

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order is simply to remove the technical objections arising from his being a party to the suit. Any objections as to competency, which would prevail against any other witness, would be equally effectual against him. So far as relates to the contracts made by him with the complainants, he has an interest that they should prevail against Perry. They were made by him as a party. That is certain, as to the Benneys, and at least probable, as to the others. If these contracts should be set aside as invalid, from a want of power or interest in him to make them, he would be liable to reimburse to the plaintiffs the moneys which they have paid to him, and also to respond to them in damages; and that, whether the contracts were made by him in his own behalf, or as an unauthorized agent for Perry. If the plaintiffs should fail on the ground that they had not complied with the terms of their respective contracts, that would exonerate Torrey. But he was not called by them to prove that; nor is it alleged or admitted by them that there was any such failure on their part. He was called by them, judging from the course of his examination by their counsel, to establish their contracts. And as to that he was interested, and his testimony is inadmissible. But it is not necessary to strike it out, in the view which we take of the case. Then as to his testimony adduced to establish the Mallory contract. As that is hostile to the contracts made by him, it would seem as though his interest must be against the party calling him. There is some reason to suppose, however, that he has an actual interest in the attempt to set up that contract. He states on his cross-examination, that he asked Roraback to get possession of that contract from Leonard, the first assignee, and told him that it would be worth \$25 to him to get it. It is in evidence that it was in fact assigned to Roraback. Harrington, one of the defendants' witnesses, testified that he heard Torrey say he had hired a man who lived at Lyons, to go and get the Mallory contract of Leonard; that he (Torrey) had got hold of it, and that it had cost him about twenty dollars. True, he said he had obtained it as the agent of Perry, and for his benefit; but Torrey denies this in his testimony; and it is evident that,

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if he did, it was not so applied. It appears from the testimony of Gen. Adams, a witness for the plaintiffs, that Torrey and Wood both applied to him for the purchase of the Mallory contract, when it was held by Roraback for their common interest; and that at one time, when they made such application, they were both together, and that the assignment was made to Mr. Wood at the suggestion of one or both of them. It is now brought forward by Wood, who is Torrey's son-in-law, in opposition to Perry's interest. There is much, besides the affinity of the parties, to show the connection of interests, as to the subject matter of this suit, between Wood and Torrey. Some work was done upon the house on the place claimed by Wood, after he came there, and he told the workman (Harrington) that Torrey would pay for it. Harrington also testifies that Wood and Torrey, together, were at the expense of clearing two acres on the same place, called "The White Oak bush pasture." That when Wood came on the place, he said he, with the assistance of Torrey, was going to repair it; that Torrey was to be at the expense, that is, he was to work there, and Torrey to assist him all he could. That Torrey agreed with the witness for the lumber to work up in the house. When he and Wood settled, Wood told the witness that he (Wood) had nothing to do with the cellar. Torrey said the same, and agreed to pay for it. Ransom, another witness, testified that he asked Wood to pay for three thousand shingles used on the place after he came there. Wood refused, and said that he was building for Torrey, and the witness might go to him. Thompson, a witness introduced by the complainants, testified, on his cross-examination, that Wood said to him, that Torrey had got him on the place and obtained the contract for the express purpose of fighting out the lawsuit with Perry's folks, and paying up the expense; that at another time Wood said they had made an arrangement to let him out of the affair, or he was going out of it, and George and Charles Torrey (the sons of the defendant Torrey) were going on the place; and that Wood had also told him that they were to have the place by indemnifying him, or keeping him clear from the costs. From all this, and

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other testimony of similar import, there is strong reason to infer, that Torrey, after having induced Perry to buy the land in question, to befriend him, and then entering into a contract with him to purchase the lands on terms which would indemnify Perry, and after having, at Perry's request, and as his agent, obtained a prior contract which had been abandoned by its proprietor, for a mere song ; and after having, through Perry's indulgence, received and applied to his own use a considerable sum of money which had been obtained through a sale of a part of the premises, turns round upon his benefactor, and sets up this prior contract to prevent him from obtaining, through the residue of the land, a part of the consideration money which Torrey had received and spent. The evidence is perhaps not sufficient to prove positively that Torrey has a fixed legal interest in setting up the Mallory contract, sufficient to absolutely disqualify him ; and his testimony, as to that, must be retained in the cause. But under these circumstances, and others strongly affecting his credibility, it ought not to, and cannot, have much weight, if any at all. It is contended by the plaintiffs, that Torrey, in making the contracts with them, acted as Perry's authorized agent, and not in his own right, claiming under his contract, and that Perry is bound to perform them. Torrey swears that after the sale and conveyances to Thompson and Godfrey, on the 4th of July, 1838, the contract between him and Perry was waived by both of them. That Perry then requested him to make sale of the residue of the lot, as his agent, but subject to his approval, and to report the sales to him. That under such authority, he made the several sales to the plaintiffs ; which were in due time reported to, and approved of by, his employer. If all this were true, Perry would have been bound to comply with the terms of the contracts when duly requested so to do. But these positions are supported solely by the testimony of Torrey, and are contradicted by himself, and by documentary and oral evidence. When asked by the defendants' counsel whether he had ever given up all his claim, on the unsold and unconveyed part of the lot, to Perry, he said that he had never talked with him on that subject.

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Even if he had concluded to waive his contract, that could not be done without the consent of Perry ; and it no where appears that such consent was ever given. But Torrey says, further, that if he had succeeded in subsequently selling all that part of the lot not included in the purchase of Thompson and Godfrey, he was to receive for his own benefit all beyond the amount due to Perry on his contract. If that was so, it was a continuance of such contract, in substance, and certainly would not prove an implied waiver. Neither could a waiver have been of any possible use to either party. But Torrey's acts look strongly the other way. He made the contract with the Benneys in his own name, as principal, and not as agent for any one. By that he agrees to sell and convey to them, by a good and sufficient warranty deed, the sixty-eight acres included in their purchase. He could not certainly convey to them until he had first received a deed from Perry ; and he had no right to that, except upon fulfilling his contract. Torrey also received, and confessedly applied to his own use, what was paid by the Benneys, and extended the time for paying the residue. There was no written contract between the plaintiff Palmer and Torrey ; nor is there any positive evidence in what character the latter made it. But he received the money paid by Palmer, and it is not proved or alleged that it was paid by him to Perry. Neither was there any written agreement between Torrey and Wood ; and there is so much contradiction between the statements in the bill, the testimony of Torrey, and the declarations of Wood, that it is impossible to say what the terms of that agreement were. The whole history of this matter is strong to show the wisdom of that provision of the statute which requires that such agreements should be in writing, and to throw doubts upon the expediency of another provision which allows courts of equity to establish verbal contracts relative to the sales of lands in cases of part performance. If there had been no relaxation, all such contracts would have been in writing. The parties would no more have thought of making verbal agreements for the sale of lands, than they do now of taking oral conveyances. Wood himself told the witness Thompson

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that he agreed to pay \$3200 for the one hundred acres sold to him—\$1700 to Perry, and \$1500 on a credit to Torrey. Besides this, it is proved that Torrey cut a considerable quantity of timber from different parts of the land sold to Wood, and it nowhere appears, nor is it alleged, that he paid the avails to Perry. All these facts go far to show that Torrey, up to and after the time of his sales to the plaintiffs, considered himself as the equitable owner of the land, under his contract with Perry; and that he made such sales with a view of enabling him to fulfil it. If so, and if such sales were not previously authorized or subsequently ratified by Perry, he would not be bound to complete them until all the money due on his contract should be paid. But if Torrey made them in his own right, and subsequently reported them to Perry, and Perry ratified them, and agreed to execute deeds to the purchasers, he would be bound to do so; provided they complied with the terms of the sales. But if the sales had been made by Torrey as Perry's agent, and, indeed, in whatever character they were made by Torrey, he himself says that they were to be subject to Perry's subsequent approval and ratification. It is supposed that he assented to them by his permitting the purchasers to make valuable improvements upon the parts sold to them with his knowledge, and without objection or explanation. He might have known of, and permitted, such improvements, without intending to execute separate deeds until all the money due to him should be paid. But there is no evidence, beyond Torrey's assertion, that Perry knew any thing about those improvements, although there is much to infer the contrary. He lived in a distant county, was an old infirm man, and was not on the lot after the sale to either of the plaintiffs. The whole of his conversation with Thompson, proved by the plaintiffs, indicates that he knew but little, if any thing, about the sales made by Torrey, or of the acts of either of the purchasers upon the premises sold them. Then, as to his approval of those sales, and his agreement to execute deeds to the plaintiffs, there is no evidence of either, except what is stated by Torrey. On the contrary, Perry's instructions to Thompson, called for by the plaintiffs,

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and on a part of which they principally found their claim for relief, clearly indicate that he had not approved of such sales, and would not confirm them, unless he could have the money due to him on his contract with Torrey effectually secured. Indeed, so far as it relates to the contract with Wood, Torrey himself says that Perry declined accepting it until he could see Thompson, and get him to make the requisite inquiries. Thompson said he did make such inquiries at Perry's request, and then, in his behalf, declined making or affirming the contracts. The weight of the evidence is, that Perry never approved of the contracts between Torrey and the plaintiffs, so as to make them obligatory on him. If, therefore, they had founded their prayer for relief upon those contracts, they have not proved that they were entitled to it.

It was said by the counsel for the plaintiffs, on the argument, that Perry took the legal title to the whole lot, subject to the equitable rights of Torrey. If that were so, such equitable rights could not now, if they would, under any circumstances, aid the plaintiffs. They would have been extinguished by, or merged in, the subsequent contract between Perry and Torrey. By that contract, they assumed, each for himself, and admitted in the other, the character of vendor and purchaser of an absolute and unconditional title in fee simple. So far as it related to their own respective claims at the time, they, and their representatives, were thereby precluded from subsequently denying the right of each to make such contract. But the plaintiffs make no claim through such alleged equitable interests, but, in fact, claim in opposition to them. Nor do they now claim the performance of their contracts with Torrey by Perry's representative; nor have they offered, either to Perry before commencing this suit, or to his representative, in their bill, to fulfil the terms of such contracts on their part. Indeed, they repudiate them, and claim under a prior and hostile contract; and upon that claim they must stand or fall. What is said (and much of it unnecessarily) in the pleadings and proofs in reference to the Torrey contracts, was probably with a view to show the equities of the several parties in the whole transaction; and it is

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in reference to those equities only, that the court has bestowed any attention upon that branch of the case.

The late vice chancellor of the seventh circuit considered the Mallory contract as still operative and binding, and upon that based his decree. But if that contract had been revived, and rendered binding on the defendant Perry, we think that the decree is erroneous in several particulars.

The decree credits to the complainants the full amount of the consideration money paid by Thompson and Godfrey on their purchase, including that portion retained by Torrey for his own use, and yet makes no provision for their protection. If the Mallory contract be valid, it necessarily annuls the title conveyed to them by Perry, and it is left in the power of Wood to harass them by litigation, if not to avoid their title altogether. If he has the benefit of the purchase, he should be expressly required to perfect it. The decree also directs that the complainants should be entitled to their deeds on payment to the defendant Perry of the sum of \$515,37; whereas the plaintiff Wood had previously tendered the sum of \$606, which the plaintiffs state in their bill they are advised and believe remains unpaid on the Mallory contract. Whenever a tender is made, *and is insisted on in the pleadings*, the creditor is at least entitled to that amount. (*Slack v. Brown*, 13 *Wend.* 390. *Birks v. Trippet*, 1 *Saund. Rep.* 33, n. 2. *Cox v. Parry*, 1 *Durn. & East's Rep.* 464.) The rule is founded in good sense. Where the debtor admits that amount to be due, it is not a point at issue between the parties so far as he is concerned, and the creditor is not required to establish it by proof. Neither do we see the propriety of charging the defendant Perry with \$875 retained by Torrey. That sum was never in fact received by Abner Perry, nor by Torrey as his agent. Torrey received it in his own right, under the interest acquired by his contract. The most that could be required by the complainants, on setting up the Mallory contract, would be, that there should be a separate valuation of the land sold to Thompson and Godfrey and the other part of the lot, and that Wood should pay to Perry the same proportion of the consideration money of the Mallory

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contract which the actual value of the land to be conveyed to him bears to the whole lot. According to the decree, Wood could obtain for the sum of \$291,37 property for which he acknowledges in his bill he was to pay \$1700, and for which, according to the statement of one of the witnesses, he was to allow \$3200. He would have paid in all, to the defendant Perry \$515,37, and to Sibley, for the Mallory contract, \$200, and he will be entitled to receive from the Benneys \$376, being the balance due on their purchase besides the interest, and from Palmer \$50, being the balance due on his purchase; while Perry must sustain a dead loss of \$875, with interest on that sum from the 4th of July, 1838, the date of the deed to Thompson and Godfrey.

But we do not think the vice chancellor was right in supposing that the Mallory contract was still operative. Mallory himself testifies that he had given up the possession of the land and abandoned that contract, and had written to that effect to Perry. Perry made no objections, but has uniformly expressed his determination not to consider it of any binding force or effect. That a written contract may be waived by parol is well settled. (17 Ves. 356. 2 John. Rep. 405.) The contract was then dead; nor was it in the power of Mallory or any one acting under him to resuscitate it. (1 Caines' Rep. 47. 3 John. Ca. 60. 5 John. Rep. 87. 9 Cowen's Rep. 46. 13 John. Rep. 359.) He informed Leonard, both before and at the time of making the assignment to him, that the contract had been given up. Leonard having taken it with a full knowledge of that fact, and from a man who was out of the possession to which he would have been entitled, had it still been operative, acquired no right to enforce it. Roraback, in making the purchase from Leonard, either acted as the agent of Perry, or in hostility to him. If he acted as Perry's agent, then the purchase enured to his benefit, and the subsequent assignment was in fraud of Perry's rights, and could not avail the assignee. But if he acted in hostility to Perry's rights, or made the purchase in his own behalf, there are other fatal objections to his acquiring any rights under it. It had been expressly abandoned by Mallory, and, although

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Leonard, when it was first assigned to him, had endeavored to obtain possession of the property, yet, he too had subsequently given it up and abandoned the contract. There had also been a default in making the first payment. By the terms of the contract, Perry was to give a deed when the consideration should be paid as therein mentioned. Two hundred dollars was to be paid within one year from its date. That period expired on the 26th day of November, 1835, and yet that sum had not been paid on the 11th of June, 1836, when the contract was assigned to Roraback. It is true, that courts of equity often give relief where there has been a failure in strictly complying with the terms of a contract. But that is only done where there is some excuse for such failure. Such relief is never granted to a purchaser where the failure has arisen from a determination on his part to abandon the contract, and the vendor has acquiesced in such abandonment, and has in consequence made an agreement to sell the land to another purchaser, and has put him in possession of the property. The prior contract would then be a nullity. It is immaterial whether Roraback, at the time of the assignment to him, was acquainted with these facts or not. An assignee of a contract takes the same subject to all existing equities in favor of the other party against the assignor; although such assignee may not have received any notice of them at the time. (2 *Vesey*, 691, 764. 1 *P. Wms.* 496. 1 *Vesey*, 123. 4 *Vesey*, *jun.* 21. 2 *John. Ch. Rep.* 401.) But there was enough in this case to charge the assignee with notice. Although the assignor would have been entitled to the possession of the land by the terms of the contract, had it not been waived or abandoned, yet he was notoriously out of possession. Leonard was in fact a resident of another state, where Roraback sought for him. Torrey was then actually in possession under a subsequent contract with Perry. All these circumstances were sufficient to put Roraback upon inquiry, and if he did not choose to make it, he and those claiming under him should be the sufferers, and not the other party. But if Leonard had not in fact abandoned the property, and made default in the performance of one of the

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conditions on which he was to be entitled to a deed, yet it was notorious that his claim was contested at the time by a person then in possession. His right was disputed, (and in fact, under the circumstances, pretended,) and he had not been in possession of the premises for the space of a year before the assignment. The circumstances bring it directly within the mischief intended to be prevented by the statute against champerty and maintenance, (2 R. S. 691, § 6,) and strongly illustrate the wisdom of its provisions. Had the contract remained in the possession of either Mallory or Leonard, there would have been no difficulty; but the transfer of it gave rise to an immediate controversy, and has subsequently been productive of a long, vexatious, and expensive litigation.

The assignment to Mr. Sibley is liable to the same, if not stronger objections. It was made after the two unsuccessful attempts, one by himself, and the other by Gen. Adams, to induce Perry to acknowledge the existing validity of the contract, and to comply with its terms. It was strongly argued by the plaintiffs' counsel, that Perry, in his conversations with Gen. Adams and Mr. Sibley, did acknowledge that the contract was then operative, and that he intended to perform it. Now it is by no means probable that Perry, after the strong determination to annul it, expressed in his letter of the 8th of April, 1835, adduced in evidence by the plaintiffs, and after having made another agreement with Torrey for the sale to him of the same land, would be willing to revive the Mallory contract. True, he did not express to Gen. Adams or Mr. Sibley, any decided determination to avoid it. That may have been owing to his respect for gentlemen of their high character and standing. Gen. Adams testified that Perry said in substance, (though he did not recollect the exact words,) that he expected to fulfil the contract, but he was some uncertain about it. If the recollection of this witness is correct, there is no positive recognition of the contract. His testimony, too, was given under circumstances which, notwithstanding his unquestioned respectability, do not entitle it to any controlling influence. He was interested at the time, and speaks merely of the substance of what was said; and

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it is well settled that no great reliance can be placed on such testimony. His memory, too, appears to be very indistinct. He does not recollect whether he tendered the amount then due, (\$200,) or the whole consideration money, (\$2750.) He says that he cannot state the amount further, than that on the morning when he started, Roraback had a few hundred dollars, (which, according to Roraback's testimony, was not handed to him,) the witness had a few hundred dollars, and he went to a neighbor and got a few hundred dollars more. He, however, states one circumstance which strongly marks the character of what was said and done at this interview—that he determined in the same year to have nothing more to do with the business. There is nothing in the conversation with Mr. Sibley, from which it can be reasonably inferred that Perry at that time recognized the validity of the contract. And the conclusion which Mr. Sibley drew from what was then said, may be inferred from the fact, that, with all his resources, he made no attempt to enforce it during the seven years while it was in his possession. The evidence is by no means sufficient to prove the alleged waiver, and it ought not to be lightly inferred against the party's own interest.

The assignment to Wood was liable to still stronger objections. He was doubtless well informed by his father-in-law of all the circumstances attending the transaction. Besides, he must have seen that the consideration expressed in the assignment was much less than what he paid—in fact merely nominal. And he knew that Sibley refused to make the assignment at all, except on the express condition that he should not implicate himself in any way, or give a remedy back on him, and that there was to be no recourse back to him in any event. All this, coming as it did from an able counsellor, was sufficient to put Wood on his guard. It was said on the argument that Perry had sanctioned the purchase of this contract by Wood, and expressed his determination to give a conveyance under its provisions. To prove this, the plaintiffs introduced Thompson as a witness. He testified that Perry, after giving him instructions relative to the sale of the lands, not based upon, but at

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variance with the Mallory contract, directed him to say that if the witness made any bargain binding Torrey to give a deed, if he was satisfied from any information that Torrey was going to make him trouble on the Mallory contract, the deed would be made subject to it; and that he communicated the substance of that conversation to Wood. What was said was based upon the supposition that Torrey might give some trouble. There was no probability of that if a deed was to be given to Wood under a sale effected by Torrey himself. And if there had been any, Torrey could easily have removed it by a release. That, therefore, afforded no good reason for the purchase of the Mallory contract. Neither was there any promise to execute a deed under it on any contingency. Perry could not have intended to revive that, when the effect of it would have been not only to repudiate his contract with Torrey, but to annul the title of Thompson and Godfrey to the land which he had conveyed to them, and made him responsible on his warranty deed for that land. Perry merely declared that if there was any probability of trouble from Torrey on the Mallory contract, his deed would be made subject to it. That could not certainly be tortured into a declaration that the deed would be made *under* it. His sole object was to avoid litigation; not certainly to revive a contract which would cause both trouble and litigation. Had Wood purchased it with a view of extinguishing an outstanding incumbrance, and charging Perry for the consideration money, that would have been well enough. But the facts afforded no excuse for his procuring it with the view of defeating the title under which he had made his purchase, and had entered into and then held possession of the land. That the law would not, and ought not to, tolerate.

The whole history of the transfer of the Mallory contract shows that it was considered by the parties as of at least doubtful validity. It was assigned to Leonard for one dollar, to Roraback for not exceeding twenty-five dollars, to Sibley (as expressed in the assignment to him) for one hundred dollars, and to Wood for two hundred dollars. The last mentioned

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sum was all that he gave for what was to transfer to him property, for a part of which, as has been before remarked, he was to pay \$3200. But the contract was dead before it was assigned at all. Nothing had occurred to restore its vitality, and Wood was precluded, under the circumstances, from setting it up to defeat the title under which he had purchased and entered into and retained possession of the land in dispute.

The parties are not entitled to any relief in this suit. So far as relates to the Benneys and Palmer, they have undoubtedly made their purchases and expended their money in good faith. If they can prove by competent testimony any valid right to have their contracts fulfilled by the Perrys, they ought to have an opportunity to do so, when freed from their existing connection with Wood. As to Wood, all that he can claim under his contract, if that is valid against Perry, is, to retain possession of the land until he is reimbursed for his expenditures. If he can prove the recognition of his contract by Perry, and that there is any thing due to him for such expenditures, he can avail himself of that defence at law ; and there is no necessity for his resorting to the equity side of this court.

The decree of the late vice chancellor of the seventh circuit must be reversed, the injunctions must be dissolved, and the bill must be dismissed, unconditionally as to Wood, but without prejudice to the rights of the other complainants (whatever they may be) under their contracts with Torrey, and the complainants must pay the costs of the defendant Perry in this suit, including her costs on the appeal.

NEW-YORK GENERAL TERM, September, 1847. *Cady, McCoun, and Hurlbut*, Justices.

BARRON vs. THE PEOPLE.

A criminal case cannot be moved out of its order on the calendar, by the defendant, unless the notice of argument states his intention of bringing it on out of its order.

A judgment against the defendant, in a criminal case, will not be reversed by default. But the court must be satisfied that there was error in the record, or proceedings, of the court below.

That part of the 97th rule which gives to the counsel for the people, alone, the right to move cases out of their order on the calendar, applies only to the first week in term. After that, either party, on a four days' notice, may bring on the argument of the cause out of its order.

THE plaintiff in error was convicted, at the oyer and terminer in New-York, of grand larceny, and brought a writ of error to this court on a bill of exceptions taken at the trial, during the third week of the term.

H. H. Burlock, for the plaintiff in error, upon a general notice of argument of four days, moved on the argument of the writ of error, out of its order on the calendar, under the 97th rule of the court.

THE COURT said the notice of argument was defective, in not stating the party's intention to bring on the argument of the cause out of its order on the calendar.

On a subsequent day, after the service of a new notice of argument, by the plaintiff's attorney, specifying his intention of bringing the cause on for argument out of its order on the calendar, on that day—

Mr. Burlock moved for judgment of reversal by default; the district attorney not appearing on behalf of the people.

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THE COURT said they would not reverse a judgment by default, in a criminal case. That a convicted criminal could not be got out of the state prison by default; but that they must be satisfied there was error in the record, or proceedings, of the court below. And they directed the plaintiff's counsel to argue the cause *ex parte*; which the counsel was proceeding to do, when

J. McKeon, district attorney, for the people, came into court and objected that the plaintiff had no right to bring on the argument of the cause out of its regular order on the calendar. He insisted that the district attorney alone had that right, under the 97th rule.

BY THE COURT. That part of the rule which gives to the counsel for the people, alone, the right to move cases out of their order, applies only to the first week in term. After that, either party, on a four days' notice, may bring on the argument of the cause out of its order on the calendar.

SAME TERM. *Before the same Justices.*

HALLIDAY *vs.* NOBLE and others.

Where an application is made to an officer, by a receiver of an insolvent corporation, for a warrant to bring a debtor before such officer for examination, pursuant to the statute, (2 R. S. 464, § 42; *Id.* 469, §§ 67, 68, 72; *Id.* 43, § 12,) the petition for that purpose should state the facts upon which the application is founded, positively, and not in the alternative.

If the petition states that the person proceeded against has in his possession, either individually or as administrator, &c., some property belonging to the petitioner; that such person, for the estate of his intestate, is indebted to the petitioner; and that he, either individually or as such administrator, has in his hands a large amount of money, belonging to the petitioner; which he has not accounted for or

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delivered over to him; such petition will be defective, and will not authorize the issuing of a warrant.

If the person against whom an application of this nature is made, is indebted only as an administrator, he is not a person liable to be proceeded against, under the statute.

If a plea is bad in substance, the plaintiff is entitled to judgment, upon demurrer, although his replication is bad.

Where a declaration charges the defendant with having committed a trespass on a particular day, if the defendant pleads an act of his done on a previous day, as a justification, he should traverse the commission of the trespass on any other day, either before, or after, the day mentioned in his plea, and before the commencement of the suit.

In such a case, the justification, if true, applies only to the particular day laid in the plea; and without a traverse it would imply an admission that the trespass complained of was committed on any other day than that.

A special plea, in an action for an assault, battery, and false imprisonment, ought either to deny the trespass alleged in the declaration, or to state such facts as will show that the imprisonment was lawful.

ON error from the superior court of the city of New-York. The facts are stated in the opinion of the court. On the decision of the cause in the superior court, the following opinion was delivered by Chief Justice Jones, upon the demurrer of the defendant Livingston.

"JONES, Ch. J. The real question between the parties, is whether there was sufficient ground for the recorder to issue the warrant, and if not, did the party take such agency in procuring the warrant, as to expose him to an action for trespass.

The gist of the case is whether the recorder could grant the warrant on the 'information and belief' of the party himself. There is no question between the parties as to the jurisdiction of the recorder to grant the warrant on the application of the receiver, when a man was supposed to be in possession of property belonging to this insolvent corporation, or to owe debts.

The act gives jurisdiction in such cases to the recorder, and authorizes him to act on the oath of the party, which is made evidence as to the possession of property by, and the indebtedness of, the party to be examined. Therefore the question is, whether this testimony, given on oath by the party was sufficient, that is, 'on his information and belief.' The party did

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not swear to the fact that Halliday was in possession of property belonging to Noble as receiver, but states it on his information and belief, which he got from the plaintiff in the suit. The act says that the fact is to be proved on the oath of the party, to his satisfaction, and there is a case which would show that it leaves him to be satisfied, and that this establishes the fact legally.

The conclusion to which the court comes on that question, is not material in this case. It is admitted, that whatever might be the effect of a want of jurisdiction, under certain circumstances, there was sufficient jurisdiction in this case to protect the officer who had the warrant. It was not one of those cases of lack of jurisdiction, such as expose a sheriff to an action. And the only question is, did the party make himself a volunteer in the case, and a party to the arrest, supposing it unwarrantable? Did the party stand in the same situation as the plaintiff, or any stranger that might interfere? What was the act of the party? He says the only agency he had in it, was to deliver the warrant from the recorder, at the request of the attorney in the suit, to the sheriff. And the question is, did it make him a party, so as to render him liable to an action for trespass?

We think not. It is clear that the clerk of an attorney, by taking a warrant to the sheriff, does not expose himself to an action. It would be his duty to do so, without knowing what the process might be, in a matter in which he was merely made the channel of conveyance, and we cannot see why Livingston does not stand in the same capacity. Though not a clerk, he was made the conduit pipe to convey the writ to the sheriff, and it would be going too far to say that every man without interest or intent, makes himself a party to the arrest of a defendant, because, merely from courtesy, or any other reason, he takes the process from the attorney, or any other person, to the sheriff, and delivers it to him; and that without giving any direction to the sheriff, he should expose himself to an action.

We therefore think, that showing this, was a sufficient bar to the action, and that the demurrer was well taken; and we

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think the same reasoning applies to Lamberson, the attorney, who does no more than follow the direction of his client, and applies to the recorder for a writ, and sends it to the officer; especially in this case, where the attorney did all in his power to render the process inoffensive to the party, by directing his promise to be taken for his appearance, thus showing the absence of any premeditated malice to injure him.

Judgment for the defendant, with liberty to the plaintiff to reply *de novo*, &c.

Halliday v. Lamberson. The like judgment in all respects."

E. Sandford, for the plaintiff in error. The judgment given for the defendant upon the demurrers of the plaintiff to the rejoinders of the defendants respectively, were erroneous, and ought to be reversed; because the petition of John Noble, which is set forth in the several replications of the plaintiff to the pleas of the defendants respectively, did not give to the recorder any jurisdiction to issue a warrant against the plaintiff. The only foundation for the jurisdiction of the recorder was the petition. And that being defective, the warrant was unauthorized and void, and consequently the alleged justification under it wholly failed. The statute gives to receivers of the effects of insolvent corporations the powers, and imposes upon them the duties in respect to giving notice, that are conferred by law upon trustees to whom the assignment of an insolvent debtor may be made. (2 R. S. 469, § 68, 70.) The notice they are thus required to give, will be found in 2 R. S. 42, 43, § 8, *sub.* 1, 2. The same statute gives a forfeiture of double the amount of the debt in case of any concealment. No question arises on the pleadings, as to the notice. The statute further provides, "Whenever the trustees shall show by their own oaths, or other competent proof, to the satisfaction of any officer named, &c., that any person who shall not have rendered an account is indebted to the debtor, or has property in his possession belonging to such debtor, such officer shall issue a warrant commanding,

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&c., to cause such person to be brought before him to be examined." (2 R. S. 43, § 12.)

Here, the material facts set forth in the petition are stated merely upon the information and belief of the petitioner; first, in general terms, without naming the informant; and secondly, upon information derived from L. Livingston, Esq.; without annexing the affidavit of Livingston. The oath of Mr. Noble was, that he had read the petition, and that the same was true of his own knowledge, except as to matters stated on information or belief, and he believed those to be true. He states of his knowledge his appointment, and that he caused notice to be published; but every thing relating to the plaintiff is stated to be on his information and belief, except that the plaintiff has not delivered any money, property, or things in action to him, except some books. The matter set forth in the petition, as the foundation for the warrant against the defendant, being mere hearsay and wholly unsupported by any oath, did not constitute a showing upon the oath of the receiver, or other competent proof, of any fact entitling the officer to act, or which can support his motion in the premises.

The statute contemplates legal evidence. True, it makes the party a witness in his own favor. But the testimony he gives must be of a legal character, and of the same nature which is required in other cases. The petitioner must testify as to facts within his own knowledge, the same as any other witness. See *Vosburgh v. Welsh*, (11 John. 175,) where the court says, in order to give the officer jurisdiction, the proof must be at least colorable. If he acts upon any evidence short of legal proof, he is a trespasser.

The 4th amendment to the constitution of the United States declares that no warrant shall issue without oath. (*See Ex parte Burford*, 3 Cranch, 448; *Ex parte* —, 7 Hill, 137.) The act to establish a uniform system of naturalization, (2 Stat. at Large, 153,) declares that the court shall be satisfied as to the applicant's being entitled to the benefits of the act; and it contains a proviso that the oath of the applicant shall in no case be admitted to prove his residence. In the case above

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referred to in *7th Hill*, the court says, the satisfactory proof required by the statute must be legal proof. In *Whitney v. Shufelt*, (1 *Denio*, 592,) the objection was not to the sufficiency of the facts, if properly proved, but because the petition did not state that the facts were within the petitioner's knowledge. (See also *matter of Bliss*, 7 *Hill*, 187; *People v. Recorder of Albany*, 6 *Id.* 429.) Where a party is permitted to be a witness in his own favor, there can be no hardship in requiring him to make legal proof. He must state facts within his own knowledge; and nothing is to be taken by intendment. It has been so repeatedly adjudged by this court, that it must be shown in support of these proceedings that the proper oath, application, and complaint was made, to authorize the issuing of the warrant, that the question cannot be deemed open for argument here. (See *Hill v. Stocking*, 6 *Hill*, 314; *Matter of Faulkner*, 4 *Id.* 598; *Ex parte Robinson*, 21 *Wend.* 672; *Connell v. Lascelles*, 20 *Id.* 77; *Ex parte Haynes*, 18 *Id.* 611; *Smith v. Luce*, 14 *Id.* 237; *Loder v. Phelps*, 13 *Id.* 46; *Tallman v. Bigelow*, 10 *Id.* 420; *Brown v. Hinchman*, 9 *John.* 75.)

The plaintiff was actually *arrested*, previous to being required to sign the promise to appear. The process directed the sheriff to take the body. If he made the arrest by virtue of the warrant, no verbal direction not to arrest would excuse. As to what is an arrest, see *Gold v. Bissell*, (1 *Wend.* 210;) 2 *Car. & Payne*, 361; 6 *Barn. & Cress.* 528. It is an arrest if the party submits to the process. (*Bull. N. P.* 62.) But there is no averment or proof, here, that the sheriff did not arrest the plaintiff. On the contrary, it is admitted that he did arrest him.

A. S. Garr, for the defendant Noble. The matters stated in the defendant Noble's second plea show that he had a right to apply to the recorder for a warrant to bring before him the plaintiff to be examined; and that the recorder had jurisdiction in the case. The facts set forth in that plea not being denied by the replication, the plaintiff has thereby admitted the existence of a state of facts, which, upon their being shewn to the

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satisfaction of the recorder, made it the *duty* of that officer to issue the warrant under which the defendant justifies. The replication is bad, because the new matter stated as inducement to the traverse, is not sufficient in substance to defeat the allegation in the plea, (1 *Chit. on Plead. 7th Am. ed.* 654. *Steph. on Plead. 3d ed.* 183, 184. *Gould on Plead. ch. 7, §§ 14, 64, p. 382, 415, of 1st ed.*)

The petition and affidavit upon which the warrant was issued, were sufficient to authorize the recorder to issue the same. The statute under which he acted, only requires that it should be shewn to his satisfaction, that there was "good reason to believe," &c. It does not, like the statutes, (2 *R. S.* 230, *orig.* § 28; *Id.* 228, *orig.* § 19; *Laws of 1831*, 404, § 35; 2 *R. S.* 3, § 5,) that were in question in the cases of *Tallman v. Bigelow*, (10 *Wend.* 420;) *Loder v. Phelps*, (13 *Id.* 46;) *Comfort v. Gillespie*, (*Id.* 404;) *Smith v. Luce*, (14 *Id.* 237;) and *Ex parte Robinson*, (21 *Id.* 672,) require an affidavit of "the facts and circumstances" on which the application is grounded. (2 *R. S.* 43, § 12. *Ex parte Fitch*, 2 *Wend.* 298. *Cases cited by Cowen, J. in Ex parte Haynes*, 18 *Id.* 612 to 614. *Matter of Faulkner*, 4 *Hill*, 598. *Matter of Bliss*, 7 *Id.* 189.) Admitting, for the sake of argument only, that the proof was insufficient, the issuing of the warrant by the recorder was an error of judgment, and not an excess of jurisdiction, and the proceeding was erroneous only, and not void. (*Van Steenbergh v. Kortz*, 10 *John.* 167. 1 *Cowen's Treatise*, 2d ed. 406. *Harmon v. Brotherson*, 1 *Denio*, 537.) In this case the court held that the judicial officer was not a trespasser; and said, "whether the attorney is liable is a question which was not discussed at the bar, and will not therefore be considered." Where a court or officer has jurisdiction of the matter and of the person, the decision, although erroneous, is valid until reversed; and its correctness cannot be collaterally examined in another suit. (*Brown v. Croul*, 5 *Wend.* 299.) Where a process is erroneous or voidable only, trespass does not lie. (*Reynolds v. Corp.*, 3 *Caines*, 267. 2 *Selv. N. P.* 116. *King v. Parks*, 19 *John.* 375. *Butler v. Potter*, 17 *Id.* 146. *Biddell v. Pakeman*, 2 *Cr., M. & Rosc.*

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30. *S. C.*, 3 *Dowl. P. C.* 714.) Even if the recorder, in issuing his warrant, exceeded his jurisdiction, still the defendant is not a trespasser; he having merely stated his case to the recorder. (*Carratt v. Morley*, 1 *Ad. & Ellis N. S.* 28. *S. C.*, 1 *Gale & Davison*, 275. *West v. Smallwood*, 3 *Mees. & Wels.* 418. *Cave v. Mountain*, 1 *Man. & Granger*, 257. *Painter v. Liverpool Gas Co.*, 3 *Ad. & Ellis*, 433.) If any action lies, it is case and not trespass. (*Elsee v. Smith*, 1 *Dowl. & Ryl.* 97. *Hopkins v. Crowe*, 7 *Carr. & P.* 373.)

Livingston Livingston, for the defendants Lamberson and Livingston. The matters set forth in the second plea of the defendant Lamberson, and in the third and fourth pleas of the defendant Livingston, are a complete justification; inasmuch as John Noble, as the receiver of the corporation, had a right to apply to the recorder for a warrant to bring before him the plaintiff, to be examined; the recorder having jurisdiction of the matter. (2 *R. S.* 464, § 42. *Id.* 469, §§ 67, 68, 72. *Id.* 43, § 12.) The matters that are stated in the pleas and admitted in the replication, constitute a complete defence to the action. The pleadings admit that such a state of facts did exist as, if shewn to the satisfaction of the recorder, would have justified the issuing of the warrant. The replication is bad; because the new matter stated as inducement to the traverse is not sufficient, in substance, to defeat, nor does it even contradict, the allegations in the pleas. (1 *Chit. on Plead.* 5th *Am. ed.* 538. *Gould on Pl. ch.* 7, §§ 14, 64, *p.* 382, 415. *Steph. on Pl.* 208, 1st *ed.*) The plaintiff should have denied that it was shewn to the satisfaction of the recorder, and not have set forth the evidence that was produced before the recorder to satisfy him. For pleading the petition is pleading the evidence of facts, instead of pleading facts themselves, and therefore the replication is demurable. (*Commercial Bank v. Canal Commissioners*, 10 *Wend.* 32. 1 *Saund. Plead. & Ev.* 417. 1 *Chitty's Pl.* 207.) Even had the plaintiff joined issue on the averment that it was shown to the satisfaction of the recorder, &c., the replication would have been demurable; inasmuch as that is an

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immaterial averment. For the warrant is set forth in the pleadings, and is signed by the recorder under his seal, in which he states that it hath been shewn, shewn to his satisfaction, &c. The plaintiff should have denied the issuing of the warrant, and every other subsequent material averment. It was unnecessary that the application to the recorder should have been made by an attorney. And by the pleadings, it does not appear that either of the defendants, Lamberson or Livingston, presented the petition to the recorder, or signed the warrant as an attorney, or otherwise, or did any thing in the premises, except deliver the warrant to the sheriff, as the agent or attorney of the receiver. If these defendants are sought to be connected in any other way with the alleged trespass, the plaintiff should have replied that they acted as the attorneys in presenting the petition, or that they signed or issued the warrant, or directed the sheriff to arrest the plaintiff, or did some other act to connect them with the alleged trespass. The mere delivering of a warrant, regular on its face, to the sheriff, does not make the person delivering it a party to the proceeding. Private persons taking process from a judge, are much more protected than officers. (*Beatty v. Perkins*, 6 *Wend.* 382.) The warrant is regular on its face, and will protect the officer and the defendants Lamberson and Livingston: it was issued, not by the defendants, but by the recorder, under his seal. It is not an imprisonment when a warrant is only used as a summons, and the plaintiff goes voluntary before a magistrate. In this case the warrant was used only as a summons. The endorsement on the back waived the arrest under the warrant, and directed the officer to take the plaintiff's promise to appear. (4 *Phillip's Ev.* 201, n. 3. *Shergold v. Halloway*, 2 *Strange's Rep.* 1002. 4 *Comyn's Dig. tit. Imprisonment*, H. 7, p. 626, *Am. ed.* 1825.) The warrant being regular on its face, and having on it the endorsement not to arrest the plaintiff, the defendant who delivered it to the sheriff would have been protected if the plaintiff had been arrested, although the officer might not, in consequence of his disobeying the endorsement. But in this case there is no evidence of an arrest. The officer was not directed

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to take a promise in writing. Nor was there in fact any interference with the liberty of the plaintiff. The affidavit of mere belief, &c. is sufficient under the statutes authorizing the warrant. Those statutes differ from the statutes respecting justices' courts, and the act to abolish imprisonment for debt, and as to absconding debtors, &c. The latter mentioned statutes require the facts and circumstances to be stated under oath, and the former does not. (*Justices' Act*, 2 R. S. 228, § 19. *Id.* 43, § 12; 664, § 42. *Absconding Debtors*, 2 R. S. 3, § 5. *Non Imprisonment Act*, *Laws of 1831*, p. 396. *Ex parte Haynes*, 18 *Wend.* 614.) All the cases cited by the counsel for the plaintiff in error were under statutes requiring facts and circumstances to be stated. The statute under which this proceeding was had, does not require competent proof; but merely proof that there is reason to believe. The former statute, (1 R. L. of 1813, p. 163, § 23,) requires proof to the satisfaction of the judge. And under that statute it has been held that proof upon information and belief was sufficient. (*Ex parte Fitch*, 2 *Wend.* 298.)

If a court or officer have jurisdiction of the subject matter, the correctness of the decision cannot be examined collaterally in a civil suit. (*Cowen & Hill's Notes to 3 Phillips' Ev.* 973. *Buquet v. Watkins*, 1 *Miller's Lou. Rep.* 131.) In this case the recorder acted judicially, in granting the warrant; and an error in his decision does not make the warrant void. But it is valid until the decision is reversed; and until reversed it is a protection to all parties. (*Tallman v. Bigelow*, 10 *Wend.* 420. *Reynolds v. Corp.* 3 *Caines*, 270. *Brown v. Crowl*, 5 *Wend.* 298. *West v. Smallwood*, 3 *Mees. & Wels.* 418. *Van Steenberg v. Kortz*, 10 *John.* 167. *Butler v. Potter*, 17 *Id.* 145.) Where the court has jurisdiction over the subject matter, and the process does not show want of jurisdiction on its face, as to the person or place, it is not void, but is a protection to an officer for all ministerial acts done by virtue of that process. (*Savacool v. Boughton*, 5 *Wend.* 180. *Bull. N. P.* 83. *Willes*, 32. *Cleaveland v. Rogers*, 6 *Wend.* 442. *Smith v. Shaw*, 12 *John.* 267. *Coon v. Congden*, 12 *Wend.* 499. *Carratt v. Mosley*, 1

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Gale & Davison, 275.) It appeared upon the face of this warrant that the recorder had sufficient evidence as to the facts set forth in the petition. This was enough to furnish a protection to the officer. No action for false imprisonment under process that is voidable only and not void, is maintainable until the process is set aside. So long as it continues in force, its validity cannot be attacked in a collateral proceeding. (*Riddell v. Pakeman*, 2 *Crompt. & Mee. Rep.* 30. 3 *Dowl. Prac. Cas.* 714. *Reynolds v. Corp.*, 3 *Caines*, 270. *Brown v. Crowl*, 5 *Wend.* 298.)

A justice's execution, regular on its face, is a protection to the officer, whether the magistrate had, or had not, jurisdiction of the case, and whether his proceedings were regular or irregular; although the suit was commenced by warrant, and no proof appeared to authorize the issuing thereof; and although it did not appear that any affidavit of indebtedness had been made by the parties. (*Coon v. Congden*, 12 *Wend.* 496. *The People v. Cooper*, 13 *Id.* 384. *Cave v. Mountain*, 1 *Man. & Gran.* 257.) On an attachment issued under the justices' act, (2 *R. S.* 228,) upon affidavits on mere belief, the court on certiorari set aside the proceedings, on the ground that the justice erred in the application of the rules of law; but said there probably was enough to protect the justice, and all others acting under the same until its reversal. (*Tallman v. Bigelow*, 10 *Wend.* 420.) [Cady, J. Is there any case deciding that proceedings of this nature may be commenced against executors or administrators?] I am not aware of any decision upon the subject; but I think it clear that the statute authorizes proceedings against administrators, as well as against other persons. [Cady, J. We very much doubt it.] The proceeding here was against the plaintiff in his individual as well as in his representative character. [Cady, J. You cannot proceed against him as administrator, any more than you could proceed against an administrator as an absent debtor. And if the claim is in the alternative it amounts to nothing. So far as relates to the call upon the administrator to render an account of the debts due by his intestate, Noble had no right to such an account. It is impossible for an administrator to render such an account.]

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E. Sandford, in reply. It is requisite not only that the officer applied to shall have jurisdiction, but that the application be made in proper legal form. The plaintiff in this case was not a proper person to be proceeded against in this manner. It was a case within the decision in 6 *Hill*. The administrator had no means of rendering an account. He could not have any personal knowledge. Besides, it was not his debt. It was the debt of his intestate. The property was alleged to be in his possession either as administrator or individually. The statute means legal proof—such proof as would be received in a court of justice.

BY THE COURT. On the 20th of July, 1841, John Noble, one of the defendants, was, by the court of chancery, appointed a receiver of the property and effects of The New-York Northern Fire Insurance Company. And on the 13th of August thereafter, he published such notice as is required by 2 *R. S.* 469, § 70. On the 24th of November, he presented a petition to the then recorder of the city of New-York, setting forth, in substance, his appointment as receiver; that he had published such notice as is above mentioned, and that he had been informed, and verily believed, that the plaintiff had in his custody or possession, either individually, or *as administrator*, &c. with the will annexed of Robert Halliday, deceased, some property belonging to the petitioner, as such receiver. And that the plaintiff, for the estate of the said Robert Halliday, deceased, was indebted to the petitioner, as such receiver, and that the plaintiff, either individually *or* as such administrator, had in his hands a large amount of money, belonging to the petitioner as such receiver, and had such property, &c. in his possession, or custody, and was so indebted prior to, and on the 13th of August then last. That the plaintiff had not delivered any money, property, or thing in action, to the petitioner, except some books belonging to the said company. That he, the petitioner, had been *informed and believed*, that the plaintiff had informed Livingston Livingston, before the appointment of the petitioner as receiver, that he, the plaintiff, had, as administrator of Rob-

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ert Halliday, deceased, between \$3000 and \$4000, belonging to the said company, and was ready to pay it over, as soon as there should be any person legally entitled to receive it. That the plaintiff had declined, and refused, to pay the same, or any part thereof, and pretended that he had no funds belonging to the corporation. The petitioner therefore prayed, that a warrant might be issued by the recorder, commanding the sheriff of the city and county of New-York, or any constable of that city, to cause the plaintiff to be brought before the recorder at such time and place as might be necessary and proper, for the purpose of examining the plaintiff, pursuant to the statute in such case made and provided. The petition was signed by the defendant John Noble, and by the defendant Frederick W. Lamberson, as attorney, and was verified as follows :

“State of New-York. City and County of New-York, ss :

On this 20th day of November, 1841, before me, came John Noble, the above named petitioner, who being duly sworn, did depose and say, that he had read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

FRANKLIN BROWN,
Commissioner of Deeds.”

On the twenty-fourth day of November, 1841, the said recorder, under his hand and seal, issued a warrant directed to the sheriff of the city and county of New-York, and to any constable thereof, in substance as follows :

Whereas John Noble, of the city of New-York, receiver of the property, estate, and effects, &c. of the New-York Northern Fire Insurance Company, hath shown by his own oath, to my satisfaction, that there is good reason to believe that Edward C. Halliday, either individually or as administrator with the will annexed, &c., of Robert Halliday, deceased, was indebted to the said John Noble as such receiver, and hath not rendered an account of such indebtedness, pursuant to the statute in such case made and provided ; and that he hath prop-

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erty in his possession or custody belonging to such receiver. These are, therefore, in the name of the people of the state of New-York, to command you, and every one of you, to cause the said Edward C. Halliday to be brought before me, at my office, in No. 20 Nassau-street, in the city of New-York, on the third day of December next, at eleven o'clock in the forenoon, for the purpose of being examined. The warrant was delivered to the said sheriff, and was served by him. The defendants, in their pleas, do not agree as to the mode of service.

The plaintiff in this suit declared against the defendants in an action for an assault, battery, and false imprisonment; and in the declaration alleged that on the second day of December, 1841, the defendants assaulted, beat and imprisoned him, for the space of two days. The defendants pleaded separately, and each of them pleaded the general issue, and one or more special pleas. The first special plea of the defendant, John Noble, is in substance as follows: 1. That he was, on the 20th day of July, 1841, by the court of chancery, appointed a receiver of the property and effects of the New-York Fire Insurance Company. 2. That on the 13th of August, 1841, he published a notice according to law, requiring all persons indebted to the company, to render him an account by the 26th day of September then next, of all sums, &c., and to pay the same, and requiring all persons having in their possession any property of the corporation, to deliver the same to him. 3. That at the time of the publication of the said notice, the plaintiff, as administrator with the will annexed of Robert Halliday, deceased, was indebted to the said corporation in the sum of \$3908,22; and had property in his possession belonging to the said corporation, of the value of \$4000; and that he did not render an account of the said debt, nor pay the same, nor deliver the property to the defendant as required by law. 4. That on the 24th of November, 1841, he showed by his own oath, to the satisfaction of the then recorder of the city of New-York, that there was good reason to believe that the plaintiff, either individually, *or* as administrator as aforesaid, was indebted to the said corporation, *or* had in his possession property belonging

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to the said corporation ; and that the plaintiff had not rendered an account as required by the said notice. 5. That thereupon the recorder issued a warrant, setting it out as above mentioned, which warrant he delivered to the sheriff of New-York, as he lawfully might ; who, on the 2d day of November, 1841, arrested the plaintiff, and caused him to be brought before the said recorder, &c., as he lawfully might ; which are the supposed trespasses, &c.

To this plea the plaintiff replied, setting out the said petition, and the jurat, and alleging that it was presented to the recorder on the 24th day of November, 1841 ; and concludes his replication with a traverse, that the defendant showed by his own oath, to the satisfaction of the recorder, &c. To this replication the defendant, John Noble, rejoined, admitting that he presented such petition to the recorder, and re-asserting that he did show by his own oath, &c., as in his second plea was alleged, and concluded to the country. To that rejoinder the plaintiff put in a general demurrer, and thereby admitted that the defendant Noble did show by his own oath, as was alleged in the plea and rejoinder.

The question upon this demurrer is, whether the matter which the defendant alleges, in his plea and rejoinder, he showed by his own oath, to the satisfaction of the recorder, was sufficient to authorize the recorder to issue the warrant set out in the plea ? The matter alleged is put in the alternative—"That the plaintiff individually, or as administrator, was indebted, &c., or, had in his possession property, &c." It is altogether uncertain from the matter alleged, whether the plaintiff owed in his individual, or representative character, or whether he was indebted at all, or whether he had property in his possession belonging to the corporation. If the plaintiff was indebted only as an administrator, he was not a person liable to be proceeded against under the statute. (1 *John. Cases*, 375. In the matter of *Hurd*, 9 *Wend.* 465. 2 *R. S.* 3, § 3.)

And the allegation being that the plaintiff was indebted either individually, or as administrator, it was left altogether uncertain whether he was, or was not, a person liable to be pro-

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ceeded against. Should a person go before a magistrate and make oath that his neighbor, John Doe, had stolen, *or* borrowed his axe, the magistrate would have no right to issue a warrant to arrest John Doe for a theft; because such an oath would render it wholly uncertain whether the accused had committed any offence so as to subject himself to an arrest. So in this case, if the defendant had made oath before the recorder, in the most positive terms, that the plaintiff did individually, *or* as administrator, owe the corporation, *or* had property belonging to the corporation, it would not have been sufficient to legalize the warrant issued against him.

The defendant Livingston Livingston pleaded three special pleas. Only two of them, however, are to be examined. His second special plea is in substance that the defendant John Noble was appointed a receiver, and published such notice as is above mentioned. That at the time of the publication of such notice, the plaintiff, as the administrator with the will annexed of Robert Halliday, deceased, was indebted to the said corporation in the sum of \$3908,22, and had property in his possession belonging, &c. and that he had not accounted for or paid the said money, or delivered the said property; and that the said receiver by his own oath showed to the satisfaction of the recorder that there was good reason to believe that the plaintiff had in his possession, either individually or as the administrator as aforesaid, some property belonging, &c.; and that the plaintiff *or* the estate of the said Robert Halliday, deceased, was indebted to the said receiver; and that the plaintiff, either individually *or* as such administrator, had in his hands a large sum of money belonging to the said receiver, and had such property, &c. in his possession, and had not delivered to the said receiver any account of such indebtedness, &c. And that thereupon the recorder issued a warrant which is set out in the plea. That the defendant, for and on behalf of Frederick W. Lamberson, the attorney in the warrant named, as he lawfully might, afterwards, and before the return thereof, to wit, on the 24th day of November, 1841, delivered the said warrant to the sheriff. That on the warrant was

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endorsed a direction to the sheriff to take the plaintiff's written promise to appear at the return of the warrant. That the sheriff, under and by virtue of the said warrant, as he lawfully might, informed the plaintiff of the warrant, and requested him to give a promise in writing to appear, &c. which the plaintiff did, and appeared accordingly; which are the same trespasses in the declaration mentioned, and whereof the plaintiff hath complained. To this plea the plaintiff replied, by alleging that the defendant, John Noble, presented his petition to the recorder, and then setting out the petition and jurat, and traversing that John Noble did by his own oath show to the satisfaction of the recorder, as in the plea was alleged. To that replication the defendant, Livingston Livingston, demurred; and thereby he admitted that the defendant, John Noble, did not show by his own oath, to the satisfaction of the recorder, as was alleged in his plea. If that allegation in the plea was material to the defendant's defence, then he has, by admitting it to be untrue, defeated his defence. But if it be an immaterial allegation, then the traverse in the plaintiff's replication is bad, and the demurrer well taken. But then the question arises, is the plea good? If the plea be bad in substance, the plaintiff is entitled to judgment, although his replication may be bad. The plea professes to answer the *whole* declaration. The declaration contains three counts, in each of which the defendant is charged with having committed an assault, battery and false imprisonment, on the 2d day of December, 1841. The plea contains no answer whatever to these three distinct trespasses alleged to have been committed on the 2d day of December, 1841; but alleges that on the 24th day of November, 1841, the defendant delivered a certain warrant to the sheriff. If the defendant intended to plead this act of his on the 24th day of November, 1841, as a justification of the trespass alleged in the declaration, he should have traversed the commission of the trespasses on any *other* day, either before, or after, the day mentioned in his plea, and before the commencement of the suit. The justification, if true, applies only to the particular day laid in the plea, and without the

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traverse would therefore imply an admission that the trespass complained of was committed on any other day than that. (*Gould's Pleading*, 359, ch. 6, pt. 11, § 99, and the cases there cited.)

Again ; a special plea in an action for an assault, battery and false imprisonment, ought either to deny the trespass alleged in the declaration, or to state such facts as will show that the imprisonment was lawful. But in this special plea there is no denial of the trespass alleged in the declaration, nor any statement of such facts as can justify the imprisonment. Strike out of the defendants' plea the allegation that the defendant Noble did show by his own oath, to the satisfaction of the recorder, &c. which the defendant by his demurrer admits to be immaterial or untrue, and the plea will contain no matter upon which the plaintiff could safely take issue. The plea throughout is in the affirmative, and contains nothing except that which the plaintiff did traverse, which it was necessary for him to deny. It is believed, therefore, that the superior court erred in giving judgment for the defendant on his demurrer.

The fourth plea of the defendant Livingston Livingston, varies from his second plea in this : instead of stating how the recorder gained jurisdiction, it is alleged therein that the recorder having jurisdiction of the premises, under and by virtue of the fourth title of the eighth chapter of the third part, and the second title of the fifth chapter of the second part of the revised statutes, issued a warrant, &c. The plaintiff in his replication to that plea, set out the petition and jurat before stated, and alleged that they were presented to the recorder, and upon that petition, so signed and verified, the recorder did issue the warrant under his hand and seal, in the words and figures in the defendant's fourth plea set forth. And then traverses that the recorder had jurisdiction, in the manner set out in the defendant's fourth plea. The defendant demurred to that replication, and thereby admitted that the recorder had not jurisdiction, as was alleged in the fourth plea ; which plea is deemed bad in substance, for reasons similar to those which

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have been stated in relation to the defendant's second special plea.

The special plea of the defendant Frederick W. Lamberson, and the pleading which followed it, are so like the second special plea of the defendant Livingston Livingston, and the replication to the same, and the demurrer to that replication, that it is not deemed necessary to say more in relation thereto, than that the judgment of the superior court in his favor is erroneous. It is therefore ordered that the judgment of the superior court, in favor of the defendants John Noble, Livingston Livingston, and Frederick W. Lamberson, be reversed.

SAME TERM. Before the same Justices.

SMITH vs. KERR.

The declarations of a defendant in a slander suit, made during an attempt to arbitrate, that he had satisfied the plaintiff by writing to his brother, and exculpating the plaintiff, are not admissible in evidence in favor of the defendant; although such declarations tend to prove one branch of the defence, viz. accord and satisfaction.

Where, on the trial of a cause, improper evidence was received, yet if it appears to the court that such evidence could not have materially influenced the jury in arriving at their verdict, a new trial will not be granted for that cause.

So in respect to an erroneous charge of the judge.

Words imputing the commission of a crime are privileged, if addressed to police officers while engaged in the investigation of such crime, *it seems*.

SLANDER, tried at the New-York circuit, in 1844, before Kent, C. J. The slander consisted in charging the plaintiff with stealing the defendant's money. And the words were uttered in the presence of police officers who were employed by the defendant to make investigations respecting a theft or robbery which had been committed in his store. There was no evidence that any other person was present at the time the

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charge was made. The defendant pleaded the general issue. Upon the trial a witness testified that subsequent to the uttering of the slander the plaintiff had said to the defendant that if the latter would write to his brother, at Albany, stating plaintiff's innocence, the plaintiff would be satisfied. The defendant's brother testified to the receipt of a letter from the defendant about a week after the money was stolen, which letter he supposed was lost; that he had looked for it among his letters and papers two or three times and could not find it, and supposed he had destroyed it. The witness being asked to state the contents of the letter, the plaintiff's counsel objected, on the ground that the declarations of the defendant were inadmissible in his own favor. But the court allowed the witness to state the contents of the letter. To which decision exception was taken. The plaintiff also excepted to other decisions of the judge respecting the admission of testimony, and to his charge; which exceptions will appear from the opinion of the court. The jury having found a verdict for the defendant, the plaintiff, upon a case, moved for a new trial.

E. C. Gray, for the plaintiff. The judge erred in permitting parol evidence to be given of the contents of the letter. The loss of the letter was not sufficiently proved. Neither should the witness Robinson have been allowed to testify as to the declarations of the defendant, in his own favor, at the time of the negotiation for an arbitration. The judge erred in charging the jury that the words uttered were privileged, if addressed to the police officers in their official capacity. The defendant was not privileged to state any thing more than the circumstances, and his suspicions. At all events, if any privilege existed, as respected the police officers, it would not excuse a declaration made to them when other persons were present, in his own store.

H. W. Robinson, for the defendant. As the evidence showed that the words used were addressed to police officers while engaged in the investigation of a robbery, they were privileged.

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(1 *Stark. on Slan.* 202. *Johnson v. Evans*, 3 *Esp. Rep.* 32. 11 *Adol. & Ellis*, 380. 20 *Wend.* 488. 12 *Id.* 546.) The charge made by the defendant was justifiable, under the circumstances, as being necessary to the detection of crime and the discovery of the criminal. (2 *Wm. Black. Rep.* 959. *Styles' Rep.* 142.)

BY THE COURT. The only objection to the ruling of the circuit judge, as to the admissibility of evidence, which we esteem worthy of notice, was taken during the examination of the witness Robinson. After he had testified to an attempt made by the parties to arbitrate, he was asked by the defendant's counsel, whether the defendant did not say, during the negotiations to effect an arbitration, that he had satisfied the plaintiff by writing to his brother. This was objected to by the plaintiff's counsel, but the court allowed the question to be put, and the witness answered, that the defendant claimed during those negotiations that he had satisfied the plaintiff by writing to his brother, William Kerr, and exculpating the plaintiff, which was all he desired. This does not appear to have been competent evidence; and its reception might be a ground for ordering a new trial, under other circumstances. But the question arises on a case, and if this evidence, although objectionable, could not have materially influenced the jury in arriving at their verdict, a new trial ought not to be granted for this cause. It is true, that the evidence tended to prove one ground of the defence, to wit, accord and satisfaction. But the facts which it was claimed constituted that branch of the defence were already made out by other evidence, and there was no controversy as to those facts.

It was clearly proved, that on one occasion when the parties were together, the defendant said he was sorry for what had occurred, and would do any thing in his power for the plaintiff. To which the plaintiff replied, that all he wished was that the defendant would write to his brother, William Kerr, in Albany; and it is proved that a letter had been so written by the defendant, by which he entirely exculpated the plaintiff. As to this,

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there was no controversy in point of fact, and the objectionable evidence was merely cumulative upon a point of fact which was clearly established before. It could not have affected the finding of the jury as to the point of fact to which it was directed, and the verdict ought not to be disturbed for this cause.

The charge of the circuit judge was substantially correct. It does not appear from the evidence, that any words imputing a crime to the plaintiff, were uttered by the defendant in the presence of any persons except the two police officers with whom the plaintiff was in communication, for the purpose of detecting a crime. Therefore that portion of the judge's charge in which he stated that the defendant would not be liable to this action for making the statement to police officers, *although done in the presence and hearing of others*, could not, even if erroneous, have had any material influence upon the decision of the jury.

New trial denied.

New 4th General Term Court Judge McCoun & Thurlbatt J.

SAME TERM. Before the same Justices. *P. 136.*

GILMORE and others vs. SPIES.

A person who puts his name upon a negotiable note—in the absence of clear and direct evidence of an intention to become a joint maker or guarantor thereof—is to be regarded only in the light of an endorser; and as assuming no other responsibility than that which an ordinary endorsement of a negotiable note imports.

Where a note, specifying no place of payment, was made and endorsed in the city of New-York, where it bore date, by persons residing in Mexico at the time, and who continued to reside there until the note became due; and the fact of their residing in Mexico was known to the holder of the note, yet he took no steps to have the note presented for payment at their place of residence, when it became payable, but kept it in his possession in the city of New-York, and merely gave notice, by letter, to the maker and endorser that the note was due and not paid; *Held* that this was not such a demand, and notice of non-payment, as the law requires, to charge the endorser.

x affirmed 1st inst. 321-

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The circumstance that the maker of a note resides in a foreign country, affords no excuse to the payee, or holder, for not following him with the note and demanding payment there, so far as the endorser is concerned; unless the payee or holder has protected himself from the necessity of doing so, by specifying some other place of payment, in the body of the note.

The holder of a note not payable at any particular place, must present the same for payment, at maturity, at the known place of residence of the maker, though it be in a foreign country; if he means to hold the endorser.

ERROR from the superior court of the city of New-York. The action in the court below was by Spies against Gilmore and J. Jewett and G. W. Jewett. The plaintiff, in the first count of his declaration, declared upon a bond executed by Gilmore as the alleged debtor, and by the other defendants as his sureties, unto the plaintiff claiming to be the creditor of Gilmore, under the 55th section of the statute relative to attachments against absconding, concealed and non-resident debtors, (2 R. S. 12,) and the act amendatory of that section. (*Laws of 1833, ch. 52, § 1.*) The condition of that bond was, that the obligors would pay to each attaching creditor the amount justly due and owing from Gilmore to him, at the time he became an attaching creditor, on account of any debt claimed and sworn to by him, with interest, and costs of the attachment. The breach assigned was that there was due from Gilmore to the plaintiff, at the time of his becoming the attaching creditor, the sum of \$737,93; which indebtedness arose upon a joint and several note for \$530,07, dated September 16, 1835, made by Gilmore and one John Furlong, payable to the order of the plaintiff, six months after date. The second count was upon a several note made by Gilmore and Furlong, of the same date and amount, and payable at the same time. The third, fourth, fifth and sixth counts charged Gilmore as the guarantor of a note of the same date and amount, and payable at the same time, made by John Furlong. The defendants pleaded the general issue, and gave notice, 1st. That Gilmore was not indebted to the plaintiff at the time of giving the bond; 2d. Payment; 3d. That Gilmore was surety for Furlong, and was discharged by time being given to Furlong, without Gilmore's consent; and 4th. Set-off.

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On the trial the plaintiff gave in evidence the following note:

—“\$530,07-100.

New-York, Sept. 16th, 1835.

Six months after date I promise to pay to the order of Mr. Adam W. Spies, five hundred and thirty 07-100 dollars, value received.

(Signed)

JOHN FURLONG.

[Due March 16-19.] (Endorsed) ROBERT GILMORE.”

He also proved that the note was given at the store of the plaintiff in the city of New-York; and that Gilmore and Furlong both resided at Matamoras, in Mexico. The cause of giving the note was this: Furlong being indebted to the plaintiff, came to his store with Gilmore, and applied for six months further credit; offering to give Gilmore as security. The plaintiff accepted the proposal; whereupon the note was drawn, signed by Furlong, and endorsed on the back by Gilmore, and the old note was given up to Furlong. When the note fell due, letters were written by a clerk of the plaintiff, to each of the parties Furlong and Gilmore, at Matamoras, informing them of the non-payment of the note, and asking payment of it. These letters were sent by the first vessel that sailed after the maturity of the note. It was also proved that Furlong was in the city of New-York after the last note was given.

The defendants objected to the testimony in relation to the sending of notice to Gilmore after the maturity of the note, and the testimony was received subject to the objection. The defendants also objected to the giving of the note in evidence; on the ground that there was no breach alleged in the declaration under which it could be received.

The counsel for the defendants insisted that Gilmore was an endorser of the note in question, and only liable upon condition of a demand of payment, at the expiration of the days of grace and notice of non-payment; and that there being no evidence of a demand of payment, and notice of non-payment, the plaintiff had not made sufficient proof to entitle him to recover. But the judge charged the jury that under the circumstances of the case, as they appeared in evidence, no demand of payment upon Furlong, the maker of the note, or notice of the non-pay-

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ment thereof to Gilmore, was required by law, to entitle the plaintiff to his action against the defendants; and that the absence or want of evidence of such demand and notice constituted no defence to the suit.

The jury found a verdict for the plaintiff.

A. Crist, for the plaintiffs in error. 1. Robert Gilmore, the alleged debtor and one of the defendants, was an endorser of the note in question; and therefore only liable, on condition of a demand of payment at the expiration of the days of grace, and notice of non-payment. His name was written in blank on the back of the note. This is in legal effect an endorsement. (*Dean v. Hall*, 17 *Wend.* 214. *Seabury v. Hungerford*, 2 *Hill*, 80. *Hall v. Newcombe*, 3 *Id.* 233. *S. C. in error*, 7 *Id.* 416.) There is nothing in the case to show that the defendant, Gilmore, contracted, or intended to contract, a different obligation. The letter from the plaintiff shows that he considered the defendant Gilmore as standing in the situation of endorser. No demand of payment was made, or notice of non-payment given. 2. There is nothing in this case which dispensed with the demand of payment, and the notice of non-payment. The defendant Gilmore was not privy to the consideration. He was a mere accommodation endorser; and he might have been charged and made liable as endorser. If this be so, the plaintiff had no right to offer the note in evidence under the declaration. The declaration counts against him as surety, and as guarantor; but not as endorser. No place of payment is mentioned in the note. The maker and endorser resided out of the state when the note was given, and when it became due. (*Taylor v. Snyder*, 3 *Denio*, 145. *Bradley v. Phelps*, 2 *Root*, 325. *Williams v. Matthews*, 3 *Cowen*, 252. *Berry v. Robinson*, 9 *John. Rep.* 121. *Anderson v. Drake*, 14 *Id.* 114.) The general rule, respecting demand of payment, as laid down in *Woodworth v. Bank of America*, (19 *John.* 391,) is that where no particular place of payment is designated in a promissory note, the holder is bound to demand payment of the maker personally, or at his residence. There is but one excep-

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tion to that rule, viz. where the maker has left the state subsequent to the execution of the note. (*Magruder v. Bank of Washington*, 9 Wheat. 598.) If the maker of a note resides out of the state at the time of giving it, a personal demand, or demand at his residence, is necessary. A notice of non-payment without a previous demand, where a demand is necessary, is a mere nullity. 3. There was no breach assigned in the declaration under which the plaintiff could give the note in evidence, or under which he could recover. 4. The plaintiff gave the maker, Furlong, time; and Gilmore, the endorser, thereby became discharged.

C. O'Connor, for the defendant in error. 1. The case of *Hall v. Newcomb*, (7 Hill, 420,) has determined that a person becoming surety for another, in the manner adopted in this case, must be treated and charged as an endorser. 2. The note in question having been given and dated at New-York, and both maker and endorser having been domiciled out of the United States, (viz. in Mexico,) at the maturity of the note, the plaintiff below was excused from making a regular demand, and from giving notice of non-payment. (*Chitty on Bills*, 8th Am. ed. 400, 485, note e, and cases cited. *Anon. Ld. Raym.* 743. *Magruder v. Bank of Washington*, 9 Wheat. Rep. 598. *Anderson v. Drake*, 14 John. Rep. 117. *Geer v. Lybrand*, 3 Ohio Rep. 319. *Dennie v. Walker*, 7 New-Hamp. Rep. 200. *Hepburn v. Toledans*, 10 Martin's Rep. 643. 2 Louis. Rep. 511, N. S. *Moore v. Coffield*, 1 Dev. Law Rep. 247. *Taylor v. Snyder*, 3 Denio, 145.) Where a maker of a note changes his residence, if it be to another place within the state, the holder must demand payment, and give notice of non-payment. But the rule is otherwise if he crosses the state line. If the principle of requiring notice to be given to parties residing in foreign countries be established, it will apply as well to short notes, notes having but a few days to run, as to long notes. If the rule is to be extended to foreign countries, it certainly must be confined within *certain* limits. And how are the courts to draw the line? Is it to be between civilization and barbarism?

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Or is distance to be the test? Or, is the rule to be extended only to commercial countries? Suppose the maker, or endorser, resides in a country in a state of war, and actually under military discipline. How is notice to be given in such a case? Numerous other difficulties might be mentioned as attending the extension of the rule to foreign countries. We should only compel a party to go so far, in order to give notice, as our laws will afford him a protection.

When the maker or endorser resides in a foreign country when the note falls due, a demand is not necessary. And if demand is not necessary, notice of non-payment is not; for the one is dependent upon the other. 3. The endorser Gilmore was liable to Spies, his immediate endorsee, under the common counts, which are included in the breaches assigned. (*State Bank v. Hurd*, 12 *Mass. Rep.* 172. 1 *Cowen's Treatise*, 232. *Grant v. Vaughan*, 3 *Burr.* 1525, approved in 12 *John. Rep.* 95. *Mandeville v. Riddle*, 1 *Cranch*, 95.) 4. The ground of variance was not taken below, with sufficient distinctness. (*Watson v. McLaren*, 19 *Wend.* 559, 563. *Pomeroy v. Underhill*, 7 *Hill*, 388.)

BY THE COURT. The case of *Hall v. Newcomb*, (3 *Hill*, 233,) and same case in error, (7 *id.* 416,) has settled the question with respect to the effect to be given to such an endorsement as was made by Gilmore upon the note in question. In the absence of clear and direct evidence of an intention to become a joint debtor, or guarantor of the note, the party here, by putting his name upon it, (the note being drawn as a negotiable note,) can be regarded only in the light of an endorser, and as assuming no other responsibility than that which an endorsement of a negotiable note imports. In this case there is no evidence to show that Gilmore intended to become bound in any other capacity, or that the creditor, Mr. Spies, expected any thing more of him.

Such being the case, the next question is, whether Mr. Spies could, under the circumstances, dispense with a demand or presentment for payment when the note fell due, and with due

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notice of non-payment to the endorser, and still hold the endorser?

The note was made and endorsed in the city of New-York, where it bears date. It was drawn payable six months after date, but no place of payment is designated in the note. Gilmore endorsed it for the accommodation of Furlong, the maker. Both maker and endorser were, at the time, in the city of New-York, though they were residents of Matamoras, in Mexico; and the fact that they resided at Matamoras, and were doing business there, at the time of giving the note, and at the time it fell due, was well known to Mr. Spies. Yet he took no steps to have the note presented for payment at Matamoras, when it became payable, but kept it in his own possession in the city of New-York. He however gave notice, by letters written immediately after the maturity of the note, to both Furlong and Gilmore, that the note was due and was not paid; which letters were transmitted by the first vessel that could be found going from New-York to Matamoras, and which left New-York about a week after such letters were written.

This was not such a demand and notice of non-payment as the law requires, to charge the endorser. The note, although made and dated in New-York, was not by its terms payable there. The creditor did not ask for such a stipulation in the note, and the circumstance that the maker resided in a foreign country is no excuse for not following him with the note, so far as the endorser is concerned; unless the payee or holder protects himself from the necessity of doing so, by specifying some other place of payment, in the body of the note. No case has been shown, either in England or this country, in which the law has been held otherwise. On the contrary, the law as laid down in the case recently reported of *Taylor v. Snyder*, (3 *Denio*, 145,) we think shows very correctly and conclusively, that under circumstances like the present, it was the duty of Mr. Spies to present the note for payment at the known place of residence of the maker, though in a foreign country, if he meant to hold the endorser. We think, therefore, that the superior court erred, and that their judgment must be reversed.

SAME TERM. *Before the same Justices.*

BURRELL vs. JACOT and others.

The payee of an instrument in these words, "New-York, May 12, 1837. Messrs. J. S. B. & J. Gent. Please deliver to C. B. jr. thirty-six dozen Stone & Co. axes. D. E. S. & Co.," on the face of which was written "accepted, J. S. B. & J.—when called for," cannot recover upon the same, against the acceptors, under the common money counts.

The acceptance of such an order, by the persons upon whom it is drawn, will not amount to a sale of the axes specified therein, to the payee.

Such an acceptance amounts only to a promise to deliver the property at a future time, on request. It is a special undertaking; and in order to recover upon it, the payee must declare upon it as such.

THIS was an action of assumpsit, tried at the New-York circuit, before Edmonds, circuit judge. The declaration contained only the common money counts; to which the defendants pleaded the general issue. Upon the trial of the cause, the circuit judge directed a nonsuit to be entered; and a motion was now made to set the same aside.

F. Sayre, for the plaintiff. Upon the testimony on the part of the plaintiff, the jury would have been authorized to render a verdict for the plaintiff for the value of the axes, under the count for money had and received; and the judge erred in ordering a nonsuit. (*Bailey v. Johnson*, 9 Cowen, 115. *Nelson v. Blight*, 1 John. Cas. 205. *Sturtevant v. Waterbury*, 2 Hall, 453. *Israel v. Douglass*, 1 Hen. Black. 239. *Quin v. Hanford*, 1 Hill, 83.)

H. B. Cowles, for the defendants. The nonsuit was properly granted, and should not be set aside. The paper called an order, or acceptance, was void by the statute of frauds. (*Watson v. Randall*, 20 Wend. 201. *Mason v. Munger*, 5 Hill, 613.) It was not admissible under the declaration and bill of particulars in the cause. It was not admissible in evidence under the common counts, (5 Hill, 613;) and the plain-

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tiff could not have recovered upon it under the common count. He should have declared specially upon the contract; setting forth the consideration: the more especially as it was a special executory contract not payable in money, or importing or expressing a consideration. 1. It was not a bill of exchange, and cannot be declared on, or in any way treated as such. It does not import a consideration, and by its acceptance no funds can be presumed to be in the hands of the acceptors. (1 *Cowen's Tr.* 160. 6 *Cowen's Rep.* 108.) 2. It is not payable in money; and it cannot be treated as money. (*Underhill v. Pomroy*, 2 *Hill*, 603. *Brown on Actions*, 515, 516. 29 *Law Lib. N. S.* 367.) 3. The words value received are not contained in it. (*Saxton v. Johnson*, 10 *John.* 418.) 4. If it had any validity whatever, it was a contract in respect to which a consideration should have been averred and proved. (*Atkinson v. Manks*, 1 *Cowen's Rep.* 692, 706, 7, 8.)

There was no sufficient consideration, expressed or proved, for the undertaking of the defendants. The plaintiff was not entitled to recover in his own name for any claim D. Stone & Co. might have had against the defendants for axes, or the proceeds of them; nor upon any claim the plaintiff might have against D. Stone & Co. The plaintiff, upon the evidence, could not have maintained an action of trover. (*Austin v. Graves*, 4 *Taunt.* 445. *White v. Wilkes*, 5 *id.* 176. *Hallenbake v. Fish*, 8 *Wend.* 547.) If he chooses to bring assumpsit, his rights must be governed by the rules incident to that action. (*Howell v. Ball*, 5 *B. & Ad.* 504. 5 *B. & Ald.* 652.)

There was not sufficient evidence either that the defendants had sold the axes, or received the proceeds of them.

BY THE COURT. The plaintiff seeks, upon the common money counts, to recover against the defendants the proceeds of an alleged sale of certain axes, under the following circumstances. D. E. Stone & Co., on the 12th of May, 1837, made and delivered to the plaintiff an instrument in writing in these words:

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"New-York, May 12, 1837.

Messrs. Jacot, Smith, Boyce & Jones,

Gent. Please deliver to Charles Burrall, jr. thirty-six dozen Stone & Co. axes.

(Signed,) D. E. STONE & Co."

On the face of this was written "accepted," and signed "Jacot, Smith, Boyce & Jones—when called for."

The firm of D. E. Stone & Co., at the date of this instrument, had from one to two hundred dozen axes deposited with the defendant, which they withdrew from the latter by orders at various times. In May, 1843, the plaintiff caused the order in question to be presented to the defendants, and a demand of payment to be made on them, in general terms. The defendants appeared to be surprised at the presentation of the order, and replied that they had not had any of that description of axes on hand for three or four years, and that their account with Stone & Co. was closed and had been settled for years, and it was their impression that this claim had been paid. The book-keeper of the defendants was called as a witness for the plaintiff, and testified that in the year 1837 the defendants were in the habit of purchasing axes of D. E. Stone & Co. They never, to witness' knowledge, sold those axes on commission; they were not commission merchants. Sometimes Stone & Co. sent axes to the store of the defendant and stored them there until D. E. Stone & Co. could sell or dispose of them.

This is the substance of the plaintiff's case. The defendant moved for a nonsuit, for several reasons; and among them, that the plaintiff could not recover under the common money counts. And the circuit judge nonsuited the plaintiff.

The acceptance of the order in question by the defendants, under the circumstances attending it, did not amount to a sale of the thirty-six dozen of axes to the plaintiff. There was no designation or setting apart of these axes from the one or two hundred dozen which the drawers of the order had at the time in the possession of the defendants. There was no delivery of

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the axes, or any circumstances from which a present delivery could be inferred. The acceptance amounted only to a promise to deliver at a future time, on request. It was a special undertaking; and in order to recover upon it, the plaintiff should have counted upon it as such.

But even admitting that the acceptance of the order amounted to a transfer of the property, the plaintiff could not recover under the money counts. There was no evidence of a sale of the axes by the defendants. On the contrary, it appears that the axes of Stone & Co. were deposited with the defendants till the owners could sell them, and that the one or two hundred dozen on hand at the date of this order were all subsequently withdrawn from the defendants' possession, by orders from Stone & Co., and the whole account was closed several years before the plaintiff presented his order, and demanded payment of the defendants. The idea that the defendants ever received any money, or any thing, for their axes, after the date of the order in question, is entirely negatived by the evidence in the case.

We are clear that the nonsuit was properly granted on the trial, and that the circuit judge erred in setting it aside.

Motion to set aside nonsuit denied.

SAME TERM. *Before the same Justices.*

AINSLIE and wife vs. THE MAYOR, &c. OF NEW-YORK.

Where an action of ejectment is brought against the actual occupants of the premises, and a judgment is recovered therein against the defendants, and an action of trespass is subsequently brought, by the plaintiffs in the ejectment suit, against the persons under whom such occupants held the premises, for the recovery of the mesne profits, such plaintiffs, to entitle themselves to recover in the latter action, must show, 1st. That they had, at the time the trespasses mentioned in the declaration,

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ration were committed, the actual possession of the premises, or a title thereto; 2d. That the defendants entered upon the possession of the plaintiffs, and expelled them, and kept them out of possession; 3d. That the defendants, by their agents, or tenants, received the rents, issues and profits while the plaintiffs were kept out of possession; 4th. That the plaintiffs had, before the commencement of the action for mesne profits, re-entered upon the premises, and regained possession thereof.

And if the plaintiffs prove all these facts, and thus show a right to recover, they can only be allowed to recover the rents and profits of such part of the premises as is proved to have been held by the defendants' authority; and for the time during which they were so held, and the value thereof.

If the evidence does not establish each of these facts, the plaintiffs should be nonsuited.

The judgment record in an action of ejectment against the actual occupants, is no evidence of the plaintiff's title or possession, in an action for mesne profits, brought against the persons of whom such occupants held the premises; where such persons do not claim under the defendants in the ejectment suit.

Such a record is no evidence against any one, other than the defendants named therein, or persons claiming under them by title accruing after the commencement of the ejectment suit.

The action of ejectment, as now used, is created by statute, and is to have the effect which is declared by statute, and no other.

Formerly, the action of ejectment was a mere possessory action, and concluded no one, either as to the title, or the possession, except as to the time between the day of the demise and the recovery. Even the party against whom the judgment was rendered was at liberty to bring a new action, and again litigate as to the possession, as often as he pleased.

But by the revised statutes, a judgment in an action of ejectment, unless a new trial be granted, concludes the parties to the action, and all persons claiming under them by a title accruing after the commencement of the suit.

The only difference between *prima facie*, and conclusive, evidence is, that the former may, and the latter cannot, be contradicted.

The fact that persons who are not parties to an ejectment suit, undertake the defence of such suit, and fail therein, will not furnish the slightest evidence of the plaintiff's title, or possession, in an action against such persons for mesne profits.

In an action of trespass for mesne profits, the plaintiff is entitled to recover damages from the time of the demise as laid in the declaration in the ejectment suit, although a period of more than six years be covered; provided the defendant has not pleaded the statute of limitations.

THE plaintiffs having recovered a judgment in ejectment against the actual occupants of the premises in question, brought this suit for mesne profits, against the defendants, as the parties of whom the occupant held. The facts are set forth, with particularity, in the opinion of the court.

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T. Sedgwick, for the plaintiffs. The evidence shows that the defendants claimed title to the premises; that their lessees were in the occupation thereof, or some part thereof; and that the defendants assumed the defence of the ejectment suit. These facts being proved, the judgment in the ejectment suit became conclusive evidence of the right of the plaintiffs to recover against the defendants in this suit; or at least *prima facie* evidence. (*Hunter v. Butts*, 3 *Camp. Rep.* 455. *Chisac v. Reinicker*, 11 *Wheat.* 280. *Bacon v. Abeel*, 3 *John.* 481. *Jackson v. Randall*, 11 *Id.* 405. *Langdyke v. Burhans*, *Id.* 461. *Jackson v. Combs*, 7 *Cowen*, 36.) As to the amount of the damages. This being an action of trespass, the jury would not be at liberty to give any thing in their discretion, beyond the actual annual value of the premises. But they could not give less than that value. To this should be added the costs in the ejectment suit. (*Goodtitle v. Tombs*, 3 *Wils.* 128. *Dewey v. Osborne*, 4 *Cowen*, 329. *Brown v. Galloway*, *Peters' C. C. Rep.* 292. *Aslin v. Barker*, 2 *Burr.* 665. *Bacon v. Abeel*, 3 *John. Rep.* 481.) The statute of limitations not having been pleaded, the plaintiffs are entitled to recover from the time of the ouster as laid in the declaration in the ejectment suit.

Willis Hall, for the defendants. Improper evidence was admitted on the part of the plaintiffs. 1. The testimony of Mr. Sedgwick should not have been received. The proceedings in the ejectment suit, and the acts of Messrs. Emmett & Cowdrey did not bind the defendants; who were not in any way connected with them by proof. 2. The declarations of the comptroller of the city of New-York, to the witness John Morrell, were improperly admitted. 3. The corporation received no proper notice of the ejectment suit; and never authorized the same to be defended. 4. All the testimony concerning what transpired in that suit was clearly irrelevant. The defendants were not shown to have been notified of that suit. (6 *Hill*, 335. 11 *Wheat.* 296, 297. 3 *Camp.* 455. 7 *Term Rep.* 112. 2 *Burr. Rep.* 668. 6 *Wend.* 534. 2 *John. Rep.* 369.) 5. The witness Morrell was improperly allowed to give parol

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evidence of the lease or leases under which he held as tenant of the corporation. 6. The leases from Morrell, and Ainslie and wife, to the ferry company were improperly admitted in evidence.

The motion for a nonsuit should have been granted. 1. The plaintiffs showed no title to the lands in question, and no possession. This was necessary, to enable them to recover. (1 *John. Rep.* 511, 512. *Id.* 133. 8 *Wend.* 587.) 2. No act which can be construed into an act of trespass was proved against the defendants.

The verdict ought to be set aside because of the excessiveness of the damages.

BY THE COURT. This was an action of trespass, commenced of January term, 1845, and tried in April of that year, when a verdict was taken for the plaintiffs, for \$2000, to be augmented or reduced by the circuit judge; subject to the opinion of the court on a case, with liberty to either party to turn the same into a bill of exceptions or special verdict.

The circuit judge afterwards gave judgment on the case so made, in favor of the plaintiffs, and increased the amount of the damages to \$2040, and the cause is now brought before this court, on an appeal from the judgment given by the circuit judge.

The declaration contains three counts. In the first count, the premises upon which the trespass is alleged to have been committed, is bounded on the north by the south side of Grand-street, in the village of Williamsburgh; on the east by a lot called "corporation lot," as laid down on a map made by Charles Loss; on the west by *high* water mark, in the East river, and on the south by a line twenty-five feet south of Grand-street, in the said village.

The premises described in the second count, are the same as in the first count, except that they are bounded by low, instead of high water mark, in the East river; and the premises described in the third count, are the same as those described in the two first counts, except that they extend into the East river so as to include a pier on the south side of Williamsburgh

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ferry. It is alleged in each count of the declaration, that the defendants, on the first day of December, 1836, with force broke and entered into the said premises, and expelled the plaintiffs from their possession, and kept them so expelled from that day until the third Tuesday of July, in the year 1842, (about five years and six months,) and during that time, took the rents, issues and profits, being of the yearly value of \$500. The defendants pleaded the general issue. The plaintiffs proved by Theodore Sedgwick, Esq. that they did, in January, 1836, commence an action of ejectment against John Morrell and Hiram Ross. The plaintiffs then called John Morrell, one of the defendants in the action of ejectment, who on his direct examination testified in substance that a declaration in an action of ejectment was served on him. That he took the declaration to the defendants' comptroller, who said he would take charge of it, and if the witness had not given notice of it, he would have rendered himself liable. The plaintiffs next read in evidence a certificate of D. D. Field, Esq. who acted as counsel for the plaintiffs on the trial of the said action of ejectment, which proved that Peter A. Cowdrey, Esq. appeared as counsel for the defendants in the action of ejectment and that he was counsel for the corporation of the city of New-York, and insisted on the trial that the said corporation was the owner of the premises, and set up a title in the corporation, based on a deed from Thomas Morrell to the corporation, dated the 3d day of August, 1805. And that he subsequently insisted that a part of the premises belonged to the state, and that the action should have been brought in the county of New-York. That after the evidence was closed and the counsel had summed up, the defendants' counsel requested the court to charge the jury that the land between high and low water mark belonged to the state. That he, the witness, was not confident as to the ground then taken as to the land between high and low water mark. He recollects that the deed above referred to purports to convey the land down to high water mark, and that no other paper title was set up on the part of the defendants in the action of ejectment. The plaintiffs then read the said

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deed in evidence. One lot therein mentioned, is described as follows: "All that certain lot, piece or parcel of land, situate, lying and being at Bushwick aforesaid, at a place commonly called Morrell's point, on the south side of a new street or road immediately to be laid out and opened at Morrell's point, near the sassafras tree, where the old store house stood; beginning at high water mark and running easterly along the southerly line of the said street or road one hundred feet; thence running southerly at right angles to the distance of twenty-five feet; thence running parallel with the said road to the East river one hundred feet; and thence along the said river to the place of beginning, twenty-five feet. The said lot containing in breadth, in front and rear, at each end, twenty-five feet; and in length, on each side, *twenty-five feet*." The plaintiffs proved by Jeremiah Johnson, that he had known Williamsburgh above half a century, and been familiar with the shore in its natural state, before Grand-street was opened, or any docks or piers built. That high water mark at the foot of Grand-street, was about ten feet west of the westerly line of *Grand-street*. The plaintiffs offered in evidence the record of the judgment in the said action of ejectment. It was objected to by the defendants' counsel. The objection was overruled, and the record read in evidence. In the declaration set out in that record, the plaintiffs claimed an undivided half of the premises in question, as tenants in common with the children of Lucretia Morrell deceased, and John Morrell; and that the defendants, John Morrell and Hiram Ross, ejected the plaintiffs on the first day of December, 1836. The ejectment was tried on the second Monday in April, in the year 1842; when a verdict was found in favor of the plaintiffs for an undivided half of the premises in question, and the record of judgment was signed on the 24th day of May, 1842. Noah Waterbury, a witness on the part of the plaintiffs, testified that he was a member of the Williamsburgh ferry company. That the company had a lease from the defendants for the ferry from Grand-street in the village of Williamsburgh, to Grand-street in the city of New-York, from 1827 to 1842. The lease was given in evidence by the plain-

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tiffs, and the property demised is therein described as follows: "All that ferry established at the foot of Grand-street in the city of New-York, over and across the East river to Morrell's point, where the boats now land, on Nassau Island, with all and singular the rights, members, profits and advantages and appurtenances thereof." The lease is dated on the 8th day of October, 1827, and was for the term of fifteen years and three months from the 1st day of February, then last past. The rent reserved, was for the first year and three months, \$75; for the next seven years, \$150 yearly, and for the last seven years, \$250 a year, payable quarterly. The witness Noah Waterbury further testified, that the rent referred to in the lease was increased. The rent actually paid by the company was \$430 per annum, under that lease. The pier and bulkhead forming the premises described in the declaration in this suit, were used for the purpose of the ferry, and the floats of the company. The floats were used for the ferry, and were attached to the piers on both sides of the slip, for the purpose of protecting their boats in coming in and going out. In October, 1841, a new lease of the ferry was granted by the defendants, which the plaintiffs read in evidence. The property thereby demised is described as follows: "All that ferry established, and to be established, from the foot of Grand-street in the city of New-York, over and across the East river, to the foot of Grand-street in Williamsburgh, where the boats now land, or to the foot of the street next to Grand-street, on the north or south thereof. And also, from the foot of Grand-street in the city of New-York, to the foot of south of 7th street, in the town of Williamsburgh, or the foot of the street next to south of 7th street, on the north or south thereof, with all and singular the rights, members, privileges, advantages, fixtures and appurtenances thereof belonging to the parties of the first part." The rent reserved was \$6000, and payable quarterly. The lessees, were at their own expense, to provide good and sufficient bridges, floats, ferry accommodations and fixtures at each landing place of the said ferry, excepting a new bulkhead and pier at the foot of Grand-street in the city of New-York, which were to be built at the expense of the les-

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sors in case the same should be deemed necessary. The witness last mentioned, further testified, that upon the termination of the ejectment suit, the ferry association held of James Ainslie and John Morrell, part of the premises described in the declaration in this suit, and paid \$500 per annum rent, for eight years. They also agreed to build a pier, to revert to the lessees at the end of their lease. That the pier has been built, and cost \$800. The counsel for the plaintiffs read that lease in evidence, which was objected to by the defendants' counsel, and the objection was overruled. The lease is dated on the 26th day of April, 1842, which was after the verdict, and before the judgment in the action of ejectment, and was made by James Ainslie, one of the plaintiffs in the ejectment, and by John Morrell, one of the defendants in that suit. The property demised by that lease, is described as follows: "All that certain piece and parcel of land, and land under water, situate, lying and being in the village of Williamsburgh, in the county of Kings, and state of New-York, commencing on the southerly side of Grand-street, twenty-five feet westerly from the northwesterly corner of a two story frame dwelling house lately occupied by Hiram Ross, and running thence southerly at right angles with Grand-street one hundred feet; thence westerly on a line parallel with the southerly line of Grand-street, into the East river as far as the right of the parties of the first part does, or may, by any act of the legislature establishing a permanent water line for said village, extend; thence northerly along said water line, one hundred feet, to a point where it would be intersected by the southerly line of Grand-street, if extended in that direction; thence easterly along said last mentioned line, to the point and place of beginning. And also, all and singular the tenements, docks, piers, bulkheads, hereditaments and appurtenances, with the rent, dockages, cranage and profits thereof, with all the rights and privileges thereunto belonging or in any wise appertaining." This lease was for the term of eight years, from the first day of May, 1842, reserving a rent of \$500, payable quarterly. It contains a recital of the title under which the lessors profess to claim.

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Robert Seeley, a witness for the plaintiffs, testified that he occupied a part of the premises described in the declaration in this suit, at a rent of \$200 per annum. The counsel for the plaintiffs offered to read the lease in evidence, which was objected to by the defendants' counsel. The objection was overruled; and the lease read in evidence. The lease bears date on the 8th day of June, in the year 1842, and was for eight years from the first day of May then last past; and was made by John Morrell and James Ainslie to the said Robert Seeley, of "All that certain lot of ground, situate in the village of Williamsburgh aforesaid, on the southerly side of Grand-street, near the ferry; being twenty-five feet in width in front and rear, and one hundred feet in depth on each side; bounded northerly in front by Grand-street, easterly by a lot of ground marked 'corporation lot,' on Loss' map, filed in the clerk's office of said county, southerly by land of John Morrell, and westerly by ground leased to Noah Waterbury and others, with the appurtenances." It was agreed that the charter of the city of New-York might be referred to. The plaintiffs offered no other evidence, and the defendants' counsel moved for a nonsuit, on the ground that the plaintiffs had not shown any title to the premises in the declaration mentioned, nor to any part thereof; nor that the defendants had committed any trespass thereupon, or had ever been in possession thereof. Which motion was overruled, and the counsel for the defendants excepted.

Daniel Ewen, a witness for the defendants, testified that he was a corporation surveyor of the city of New-York; and on being shown the map of the corporation property at Williamsburgh, he said it was correct. It was agreed that the said map might be referred to. On being shown a map of the said property, he said it was substantially correct. That he made the survey for that map in 1842. Before 1827, the pier was as is indicated by the pink color. After that, it was filled out, and made to conform to the blue lines. The corporation have built a pier, or bulkhead, at the end of the premises described in the declaration in this cause. It appears on the map just shown to

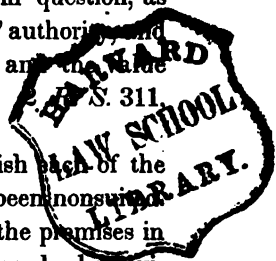
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him, and is marked in pencil, "addition to the pier made by the corporation since 1827, and recent bulkhead built by the corporation."

The plaintiffs, to entitle themselves to recover, were bound to show—

1. That they had, at the time the trespasses mentioned in the declaration were committed, the actual possession of the premises in question, or that they then had a title to the said premises. 2. That the defendants, by some person or persons acting for them, and by their authority, entered upon the possession of the plaintiffs, and expelled them, and kept them out of possession. 3. That the defendants, by their agents or tenants, received the rents, issues and profits of the premises, while the plaintiffs were kept out of possession. 4. That the plaintiffs had, before the commencement of this action, re-entered upon the said premises and regained possession thereof. (19 *Wend.* 507. 9 *John. Rep.* 61. 2 *John. Cas.* 27.) And, 5. If the plaintiffs had proved all the preceding facts, and thus shown a right to recover, they could only be allowed to recover the rents and profits of such part of the premises in question, as was proved to have been held by the defendants' authority, and for the time during which they were so held, and the value thereof. (*Arlin v. Parkin*, 2 *Burr. Rep.* 668. 2 *S.* 311. § 48.)

If the evidence above set forth did not establish each of the facts above stated, the plaintiffs ought to have been nonsuited. What evidence did the plaintiffs give of title to the premises in question, or any part of them? They offered no deed in evidence for the purpose of showing that they, or any person under whom they claim, had title prior to the time when the trespasses complained of are alleged to have been committed. What evidence did they give, that they had before, or at the time, the trespasses complained of were committed, the actual possession of the premises in question? None, whatever. No witness was called to prove that the plaintiffs, or any person under whom *they* claimed, had ever had the actual possession of the premises, at any time before April, 1841. Not content with



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omitting to prove that they ever had possession, they called Noah Waterbury, and proved by him, that the ferry company, of which he was a member, had the undisturbed occupation of the pier mentioned in the third count of the declaration in this cause, from October, 1827, to February, 1842; and to prove who had possession before 1827, no evidence was given. The plaintiffs, therefore, in the opinion of the court, wholly failed to prove that they had title to, or possession of, the premises in question; and ought, for that cause, if for no other, to have been nonsuited. The plaintiffs were allowed, notwithstanding the objection of the counsel for the defendants, to read in evidence the record of a judgment in an action of ejectment. Although the plaintiffs' counsel admitted on the argument, that the record was not conclusive evidence of the plaintiffs' title or possession, as against the defendants in this suit; yet he was understood to insist, that the record was *prima facie* evidence against the defendants in this action, of every fact of which it was conclusive evidence against John Morrell and Hiram Ross, the defendants in the action of ejectment. Can this be so? That record is conclusive evidence of the plaintiffs' title and possession, as against the defendants therein named; but it has no force against any one else, except that which the legislature hath given to it. 2 R. S. 309, § 36, declares that such record shall be conclusive as to the title established in such action, upon the party against whom the same is rendered; and against all persons claiming from, through, or under such party, *by title accruing after the commencement of such action*. And the only difference between *prima facie*, and conclusive evidence, is understood to be, that the former may, and the latter cannot, be contradicted. Can this record, as against the defendants in this suit, be *prima facie* evidence of the plaintiffs' title or possession, so as to make it necessary for the defendants to give evidence to contradict the plaintiffs' title or possession? The action of ejectment, as now used, is created by statute, and is to have the effect which is declared by statute, and no other. Formerly, the action of ejectment was a mere possessory action, and concluded no one, either as to the title or posses-

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sion, except as to the time between the day of the demise and the recovery. Even the party against whom the judgment was rendered was at liberty to bring a new action and again litigate as to the possession, as often as he pleased. But by the revised statutes, a judgment in an action of ejectment, unless a new trial be granted, concludes the parties to the action, and all persons claiming under them, by a title accruing *after* the commencement of the action. The defendants in this action do not claim under the defendants in the action of ejectment, and consequently, the record in the action of ejectment is *no* evidence against them, of the plaintiffs' title, or possession. The record is conclusive evidence against John Morrell and Hiram Ross, the defendants named therein, that on the first day of January in the year 1836, the plaintiffs had title to, or the actual possession of, one undivided half of the premises described in the declaration. But there is no law making that record *prima facie* evidence against any one, other than the defendants named therein, or persons claiming under them. The evidence that John Morrell gave the declaration in the action of ejectment to the defendants' comptroller, and that he promised to take care of it, and said that if he, John Morrell, had not given notice of the ejectment he would have been liable, did not furnish a presumption in favor of the plaintiffs' title, or possession. Nor did the evidence of what Peter A. Cowdrey ever said, and did, tend to show that the plaintiffs ever had title to, or possession of the said premises, or any part thereof. The record, therefore, in connection with the other evidence in the cause, ought not to have been read as evidence of the plaintiffs' title, or possession, at the time the trespass mentioned in the declaration was committed. Were it conceded that the defendants in this suit took on themselves the defence of the action of ejectment, and failed therein, it would not furnish the slightest evidence of the plaintiffs' title or possession, as against these defendants; because they may have had a perfect title, and the defendants in the ejectment may have admitted the plaintiffs' title in such a manner as to be concluded by the admission. And the defendants in this action are not to be prejudiced by

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any thing which the defendants in the ejectment have said, or done. And as the plaintiffs failed to prove that they had title or possession when the trespass mentioned in the declaration was committed, they ought to have been nonsuited. Had the plaintiffs succeeded in showing that they had the title, or the actual possession, of the premises in question, when the trespass complained of was committed, it would then have been necessary for them to prove that the defendants, by some person or persons acting by their authority, entered upon the plaintiffs' possession and expelled them, and kept them out of possession, as is alleged in the declaration. But they gave no evidence of such trespass and expulsion by persons acting by the authority of the defendants. The record is conclusive evidence against John Morrell and Hiram Ross, that they entered upon the possession of the plaintiffs, and wrongfully withheld from them the possession of *some part* of the said premises; but it is difficult to imagine how that which is conclusive evidence against John Morrell and Hiram Ross, that they committed the trespass, can be *prima facie* evidence that the defendants in this action committed the same trespass. To charge the defendants for the acts of John Morrell and Hiram Ross, it was necessary for the plaintiffs to prove, otherwise than by the record, that John Morrell and Hiram Ross did commit the trespass complained of, and by the authority of the defendants. But the plaintiffs gave no such evidence. They did not prove that Hiram Ross ever entered on the premises in question, or had possession thereof for one moment. But they did prove that John Morrell was the lessee of the defendants, of the lot called "corporation lot," which is no part of the premises in question; and that he built a stoop which extended over that lot on to the east part of the premises in question, but they did not prove that in building that stoop he acted by the authority of the defendants, or ever paid to them one cent for the rent thereof. The plaintiffs did not prove that John Morrell ever had possession of any part of the premises in question, other than the land covered by the said stoop. But, on the contrary, the plaintiffs proved by Noah Waterbury, that the ferry company, of which

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he was a member, from October, 1827, to February, 1842, used the pier mentioned in the declaration, and the bulkhead *not mentioned therein*, for the ferry and the floats of the company, and thereby the plaintiffs disproved the allegations in the record of the judgment in the action of ejectment, that John Morrell and Hiram Ross entered upon the possession of the pier, and withheld the same from the plaintiffs. The plaintiffs cannot in this action be entitled to recover for the use had of the pier by the ferry company, without showing that they, the plaintiffs, had the title to, or the possession of, the pier, and that the ferry company ousted them by the authority of the defendants. This the plaintiffs have not made an effort to prove. By the lease of 1827, made by the defendants to the ferry company, nothing but the ferry was demised; the pier is not mentioned therein. The rents, which the ferry company agreed to pay, and have paid, were for the ferry, and for that only. And to the ferry the defendants are entitled, by their charter, and the plaintiffs make no claim thereto. The plaintiffs did not prove that the defendants, by their agents, had ever received any of the rents and profits of any part of the premises in question. And what evidence did they give, that before the commencement of this action, they had re-entered upon the premises described in the declaration, and regained possession thereof? No legal evidence whatever has been given of that fact. If, with the record of the judgment in the action of ejectment against John Morrell and Hiram Ross, the plaintiffs had given in evidence a writ of possession issued on that judgment, and proved that by virtue thereof John Morrell and Hiram Ross had been turned out, and they, the plaintiffs, put into possession of any part of the premises in question, they would have shown by competent evidence, that they had lawfully regained possession of such part of the premises in question. (*Jackson v. Combs*, 7 *Cowen*, 36. *Chirac v. Reinicker*, 11 *Wheat*. 280.) But no writ of possession executed was offered in evidence; and without that, the record of judgment ought to have been excluded.

If the plaintiffs had proved a title, or prior possession, and

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that the said John Morrell and Hiram Ross, as the agents of the defendants, have entered upon the possession of the plaintiffs, and kept them out, and received the rents and profits for the defendants, it would have been necessary for the plaintiffs to prove how long John Morrell and Hiram Ross had engaged the premises, and what was the value thereof. In the case of *Astin v. Parkin*, (2 Burr. Rep. 668,) Lord Mansfield says, that "as to the length of time the tenant has occupied the premises, the judgment proves nothing; nor as to the value. And, therefore, it was proved in this case, (and must be in all,) how long the defendants enjoyed the premises, and what the value was." And by 2 R. S. 311, § 48, it is declared that on the trial of an issue joined in the proceedings to recover the mesne profits, "The plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into possession of the premises; the time during which he enjoyed the mesne profits thereof, and the value of such property." It has already been shown that there is no evidence in the case proving that Hiram Ross ever had possession of any part of the premises for a single day. Or, that John Morrell ever occupied any part of the premises in question, except the land covered by a stoop which he built. And no witness was called to prove the value of any part of the said premises; nor was such value proved by any admissible evidence. The plaintiffs, for the double purpose of showing that they have regained possession, and proving the value of the premises, were allowed, although objection was made, to read in evidence the two leases before mentioned, and made by James Ainslie, one of the plaintiffs, and John Morrell, one of the defendants. These leases were not admissible evidence for any purpose. They were no better evidence that James Ainslie had regained possession, or of the yearly value of the premises demised, than the declarations of James Ainslie or John Morrell would have been. If, to show that he has regained possession, or to show what was the value of the premises in question, from 1836 to 1842, the plaintiffs can give in evidence a lease afterwards made by himself, he can recover what sum he pleases; for it

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would not be difficult for him to find some irresponsible person to accept a lease reserving such rent as the lessor may choose to insert; and if the ferry company were in fact the tenants of the defendants, as to the pier, then the lease to them from James Ainslie and John Morrell is utterly void as to the defendants. (1 *R. S.* 744, § 3.) There was no judgment against the ferry company under which they could have been turned out of possession. And if that company were not, as to the pier, the tenants of the defendants, and the plaintiffs have been prior to and since the year 1827, the owners of the pier, then most clearly the company, and not the defendants, were responsible to the plaintiffs for the use and occupation of the pier. If, to entitle the defendants to a new trial, it were necessary to examine the ground upon which the circuit judge estimated the damages, it might be shown that he fell into several mistakes as to matters of fact.

The following extract, from the opinion of the circuit judge, shows how he arrived at the conclusion that the plaintiffs were entitled to recover \$2040 damages. "It seems, that prior to the recovery in ejectment, the defendants received as rent of a part of these premises, \$430 a year, and since the recovery \$500 a year rent has been paid for the same part of the premises, and \$200 a year for the residue thereof. How much was paid for this latter part prior to the recovery does not appear. It is perhaps fair to presume, situated as the premises are, and have been for several years, that all parts of them were in as much demand prior to the recovery as since.

"The demise is laid in the declaration at 1st December, 1836, and there being no plea of the statute of limitations, the damages are to be calculated from that time. Taking then the rent at \$630 a year, for five years and five months, and allowing interest upon it from the end of each year, and the costs as taxed at \$130, and allowing these plaintiffs one half of that sum, as their suit is only for a moiety, and they would be entitled to \$2040,67, for which amount there must be judgment for the plaintiffs.

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Rent from 1 Dec. 1836 to Dec. '37,	\$630
Int. to 1 May, '42, 4 y'rs 5 m's,	194,77
Rent from 1 Dec. '37 to Dec. 1, '38,	630,00
Int. as above 3 y'rs 5 m's,	150,67
Rent from 1 Dec. '38 to 1 Dec. '39,	630,00
Int. 2 y'rs 5 m's,	106,57
Rent from 1 Dec. 39 to 1 Dec. '40,	630,00
Int. 1 y. 5 m's,	62,47
Rent from 1 Dec. '40 to 1 Dec. 41,	630,00
Int. 5 m's,	18,37
Rent from 1 Dec. '41 to 1 May, '42,	262,50
Costs of ejectment,	136,00
	<hr/>
	\$4081,35
	<hr/>
	\$2040,67"

The annual rent of \$430, which the defendants received from the ferry company, was received exclusively for the ferry. Not one cent of it was received for the *pier*, or for any other part of the premises mentioned in the plaintiffs' declaration. In relation to the land leased to Robert Seeley, and for which he was to pay an annual rent of \$200, the circuit judge assumed that all that land was a part of the premises in question. Whereas only one fourth part of it was a part of the premises described in the plaintiffs' declaration. The land leased to Robert Seeley, extends from Grand-street, south one hundred feet. The premises described in the declaration extend from Grand-street, only *twenty-five feet*. It is evident, therefore, that the damages as settled by the circuit judge are, by reason of his mistake as to matters of fact, excessive. But independent of the damages, a new trial ought to be granted. The costs to abide the event.

SAME TERM. *Before the same Justices.*HOFFMAN *vs.* DUNLOP and others.

A release executed to one of several joint covenantors in a charter-party, absolute in its terms, and containing no reference to the "act for the relief of partners and joint debtors," passed April 18, 1838, does not fall within the provisions of that act. Such a release is to be construed with reference to the common law. And viewed in that light, it is a discharge of all the joint covenantors.

COVENANT on a charter-party. At the trial, before Kent, C. Judge, at the New-York circuit in October, 1844, the defendants Drew, Dunlop, Stevens and J. C. Heartt, severally pleaded in bar, *puis darrein continuance*, a general release from the plaintiff to J. C. Heartt and the legal representatives of R. P. Heartt deceased, two of the covenantors. To these pleas the plaintiff demurred; and assigned for causes of demurrer that under the act entitled "an act for the relief of partners and joint debtors," passed April 18, 1838, the plaintiff might lawfully release and discharge two of the joint covenantors without releasing or discharging the other covenantors, or impairing his remedy against them. The defendants joined in demurrer.

E. Hoffman, for the plaintiff. The plaintiff, by releasing the Heartts, did not discharge the other defendants. It was not his intention to discharge all the defendants. This is manifest from the release itself, and from the fact that it was executed by the light of the act of April, 1838. (*Laws of 1838, p. 243.*) That act authorizes the discharge of one of several partners and joint debtors, without releasing the others. And it was not necessary to refer to the law, because the law forms a part of every contract; and the act of 1838 was as much a part of this contract as if its provisions had actually been written or embodied in the charter-party. (*Ogden v. Saunders, 12 Wheat. 240. 1 Peters, 64. People v. Purdy, 2 Hill, 39.*)

The law of 1838 was passed for the express purpose of abrogating the common law doctrine, that the discharge of one joint debtor discharges all. A release of one joint debtor is no dis-

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charge of the others; unless it appears that it was the intention to discharge them all. (*Cowen's Tr.* 2d ed. 556. 1 *Bos. & Pul.* 138. 16 *John.* 233, 250.)

The court will allow the plaintiff to enter a *nolle prosequi* as to the defendant J. C. Heartt, and to take a judgment against the other defendants; inasmuch as his plea sets up a matter going to his individual discharge alone. (*Bank of Columbia v. Oakley*, 4 *Wheat.* 235.)

H. B. Cowles, for the defendants. The release does not come within the act of 1838. That act merely covers cases of compromise or composition. The demurrers, though professing to assign causes, do not set up the essential point, or present any question of law. The question was, whether the plaintiff did not discharge two of the defendants without discharging the others; whereas the demurrer says that he might have released two, without discharging the others. In *The Bank of Poughkeepsie v. Ibbotson*, (5 *Hill*, 460,) Bronson, J. said that the act of 1838 seems not to contemplate the giving of a technical release to one of the partners or joint debtors. And he decided that if a creditor executes a technical release to one of several joint debtors, absolute in its terms, and not qualified by a reference to the act, it will operate as a discharge of all.

Here the action was brought upon a joint covenant, and the release contained no reference to the act of 1838. The release pleaded was therefore a bar to the action. (7 *John.* 207. 1 *Hill*, 185. 5 *Id.* 461.) [Cady, J. The pleas do not state that the release discharged the cause of action set forth in the declaration. The release, as set out, professes to discharge all demands, &c. against the persons released. Now the right of action upon the charter-party is not a demand; and the release does not appear to embrace it. The pleader should have applied the release to that cause of action, and not have left it to the court to apply it.] The pleas only attempt to state facts; leaving the court to apply the law to those facts. Had the pleas stated that by the release the cause of action in this suit was discharged, this would have been pleading matter of law.

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The covenant sued on was a joint covenant. (*Platt on Cov.* 115, 122, 123.) And if the Heartts were released, then all the covenantors were discharged.

BY THE COURT. The release pleaded does not fall within the provisions of the act of 1838. It must be construed with reference to the common law; and viewed in that light, it is a discharge of all the defendants.

Judgment for the defendants on the demurrer; with leave to the plaintiff to reply on payment of costs.

SAME TERM. *Before the same Justices.*

In the matter of PAUL BRUNI.

The act of congress entitled "An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States," passed March 2d, 1829, confers no power upon any but courts and officers of the United States. And no court, judge, justice, or other magistrate of this state, can lawfully assume to execute its requirements.

The proceedings, upon an application under that act, against an alleged deserter from a foreign vessel, must show that the person proceeded against deserted from the vessel while in a port of the United States.

Unless that fact appears, the officer to whom application is made will not obtain jurisdiction to act upon the complaint.

It is in the discretion of the court either to allow a writ of certiorari in the first instance, or to grant an order to show cause.

The supreme court has power to review, upon certiorari, the proceedings of a magistrate of this state who, while professing to exercise a jurisdiction conferred by act of congress, acts in the name of the people of this state, by writs of the people, directed to state officers.

THIS matter came before this court on the return of two certioraris; one directed to Judge Edwards of the supreme court, and the other to William W. Drinker, one of the special justices appointed under the laws of this state for preserving the peace in the city of New-York. The facts of the case are these:

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Paul Bruni, a Swiss, shipped on board the French steamship Philadelphia, a vessel in the employ of the French Transatlantic Steam Navigation Company, in the month of July last, as a domestic, for the voyage from Cherbourg in France, to New-York, and back. On the arrival of the steamer at New-York, Bruni left the vessel, alleging that he had been cruelly treated by the captain. Application was then made to Mr. Drinker, the special justice, for the arrest of Bruni as a deserter. The application was made under the act of congress, entitled "An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States," passed March 2d, 1829, which is in these words: "Sect. 1. *Be it enacted, &c.* That on application of a consul or vice consul of any foreign government having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named, has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll or other official document, that the person named belonged, at the time of the desertion, to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate having competent power to issue warrants, to cause the said person to be arrested for examination: and if on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the said consul or vice consul, to be sent back to the dominions of any such government, or on the request and at the expense of the said consul or vice consul, shall be detained until the consul or vice consul finds an opportunity to send him back to the dominions of any such government: *Provided nevertheless*, that no person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty, and shall not be again molested for the same cause: *And provided further*, that if any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be de-

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pending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

The sixth article of the treaty with France of June 25th, 1822, is as follows: "Art. 6. The contracting parties wishing to favor their mutual commerce, by affording in their ports every necessary assistance to their respective vessels, have agreed that the consuls and vice consuls may cause to be arrested the sailors, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country. For which purpose the said consuls and vice consuls shall address themselves to the courts, judges and officers competent, and shall demand the said deserters in writing, proving by an exhibition of the register of the vessel, or ship's roll, or other official documents, that those men were part of said crews: and on this demand so proved, (saving, however, where the contrary is proved,) the delivery shall not be refused: and there shall be given all aid and assistance to the said consuls and vice consuls for the search, seizure, and arrest, of the said deserters, who shall ever be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back. But if they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause."

The application to the special justice was signed in the absence of the French vice consul, by Anthony Borg, his clerk, and bore the seal of the consulate impressed upon the paper. The French consul and vice consul had previously given authority to him to use their names, and the seal of the consulate, in cases of emergency. The application is as follows:

"Consulat Général de France aux Etats Unis.

"The consul general of France requests that the police magistrate will issue a warrant for the apprehension of a sailor belonging to the French steamship Philadelphia, Captain Bes-

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son, viz. Paul Bruni, aged 26 years, deserted from the said vessel the 3d of this month. New-York, August 6, 1847.

[L. s.]

"For the Consul General

"ANT. BORG, for Vice Consul."

At the time the application was presented to the special justice, a paper was exhibited to him, which he says in his return, he "was satisfied from inspection, was the role de equipage of the steamship Philadelphia, upon which appeared the name of the said Paul Bruni, designated as a domestique engaged for the voyage." The justice thereupon issued the following warrant for the arrest of Bruni. There were no witnesses examined, nor was any oath or affirmation taken in the matter.

State of New-York. City and county of New-York: To any constable or policeman of the city of New-York. Whereas, complaint on oath has been made before the undersigned, one of the special justices for preserving the peace in the said city, by Ant. Borg, that at the city and county of New-York, on the 3d day of August instant, one Paul Bruni did desert from the French steamship Philadelphia, Capt. Besson, the said Bruni being a regularly shipped seaman, still owing labor and service thereto. These are therefore, in the name of the people of the state of New-York, to command you, the said constable and policemen, and every of you, to apprehend the body of the said defendant, and forthwith bring him before me, or some other justice of the peace, for the city and county of New-York, at the police office, halls of justice, Centre-street, in the said city, to answer the said charge, and to be dealt with as the law directs.

Given under my hand and seal this 6th day of August, 1847.

W. WALN DRINKER.

On this warrant Bruni was arrested on the 11th of August in the evening, and lodged in the prison of the city of New-York, and on the following morning was brought before the special justice, when the following proceedings took place,

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as stated by the justice. "I duly examined him and told him he was charged with being a deserter from the steamship Philadelphia. I asked him what he had to say in relation to the charge; that he admitted, and said he had deserted, and assigned as a reason therefor, that he had been cruelly treated by the captain of the said steamship." This was the only examination had. No witnesses were sworn, nor was any other evidence taken. The justice thereupon issued the following warrant of commitment.

State of New-York, ss. By W. Waln Drinker, special justice, &c. To Emmanuel Joseph, one of the constables of the city and county of New-York. Paul Bruni having been arrested and brought before me, by virtue of a warrant issued by me, in pursuance of the act of congress, entitled "an act to provide for the apprehension and delivery of deserters from certain foreign vessels, in the ports of the United States," approved 2d March, 1829: And it being found on examination before me that the facts stated in the said warrant are true, and the said Paul Bruni not being a citizen of the United States: I do hereby in pursuance of said act of congress, on the request of Ant. Borg, vice consul of the government of the French, order that the said Paul Bruni be detained at the expense of the said French vice consul, until he, the said French vice consul, finds an opportunity to send him back to the dominions of the said French government. Provided nevertheless, that the said Paul Bruni shall not be detained more than two months after his said arrest. These, therefore, are to command and authorize you, the said Emmanuel Joseph, constable, &c. to convey to the city prison of the city of New-York, the body of the said Paul Bruni, and deliver him to the keeper thereof; and you the said keeper to receive into your custody in the said prison, the body of the said Paul Bruni, and him safely to keep in such custody until the said French vice consul shall require that the said Paul Bruni be delivered up to him, to be sent back to the dominions of the said French government, or until he be delivered from such custody by due course of law. Provided

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however, that the said Paul Bruni shall not be so detained more than two months after his said arrest. Given under my hand and seal this twelfth day of August, 1847.

W. WALN DRINKER.

A writ of habeas corpus was thereupon sued out, directed to the keeper of the city prison in whose custody Bruni was placed under the above commitment, and returnable before Henry P. Edwards, one of the judges of the supreme court at chambers. The keeper of the city prison returned the warrant of commitment of Justice Drinker as his authority for the detention of Bruni. To this return Bruni put in his answer, denying that he was or ever had been a sailor or seaman on board the steamship Philadelphia, or any part of the crew, and also stating in substance that he had been cruelly treated by the captain, the details of which he set forth; that the special justice who made the commitment had no authority or jurisdiction in the matter, under the act of congress; that no proper application in writing was made to the justice by the French consul or vice consul, and that the proceedings before the justice were had without oath or affirmation, and were irregular and void.

Evidence was then taken before judge Edwards, and it appeared that the application was made and signed in the absence of the French vice consul, by his clerk: that neither the consul or vice consul had seen it, but approved of the act of the clerk the moment they were informed of it, and that general authority had previously been given by them to the clerk to use their names, and the seal of the consulate, in cases of emergency; that the proceedings before Justice Drinker were without oath or affirmation from any one, and that Bruni was engaged on board of the steamer under the general designation of "*domestique*."

D. D. Field, of counsel for Bruni, then moved for Bruni's discharge, and

E. Sanford, of counsel for the French vice consul, opposed.

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After argument, Mr. Justice Edwards denied the motion to discharge, and ordered Bruni to be remanded to the custody of the keeper of the city prison. The following opinion was given by

EDWARDS, J. At the commencement of the investigation, in this case, I decided that the commitment was *prima facie* legal, and justified the detention of the relator; that I had no power, under this proceeding, to examine into any question of mere error, irregularity, or want of form; and that the only question before me was, whether the magistrate who issued the process of commitment had jurisdiction. (*The People v. Nevins*, 1 *Hill*, 154. 3 *Id.* 661, note sub. 31, and cases there cited.) It was not denied, on the contrary it was admitted, by the counsel for the relator, on the final argument, that this was the only proper subject of inquiry.

The commitment under which Bruni was detained, purported to be made in pursuance of the act of congress of 2d March, 1829. The act does not refer particularly to the French government. It refers to "any government having a treaty with the United States, stipulating for the restoration of seamen deserting." And it appears by reference to the 6th article of the treaty with France, that she had such a treaty with the United States as is required by the act. (8 *Stat. at Large*, 279, art. 6.)

As the first question is one of jurisdiction, the first inquiry is, at what stage of the proceedings did Justice Drinker obtain jurisdiction of the matter, if he obtained such jurisdiction at all? The answer to this, unquestionably, is that if all the proceedings were regular, up to the time when the relator was brought before the magistrate under the warrant issued by him, he then had jurisdiction both of the person, and of the subject matter. If he thus obtained jurisdiction, his subsequent decision, and commitment of the relator, are conclusive as far as this investigation is concerned, and I have no authority to review them.

By reference to the act of congress, it appears that there must be "an application of the consul or vice consul," which must be

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"made in writing, stating that the person therein named has deserted," &c. and that "on proof by exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of the desertion, to the *crew of said vessel*, it shall be the duty of any court, judge, justice or *magistrate having competent power to issue warrants*, to cause the said person to be arrested for examination."

There were four requisites necessary to the regularity of the proceedings before Justice Drinker, previous to the examination. 1st. An application pursuant to the provisions of the statute. 2d. Proof, by exhibition of the ship's official document, that Bruni, at the time of the alleged desertion, belonged to the crew of the Philadelphia. 3d. That the magistrate should have had competent power to issue warrants. 4th. That the said magistrate should have caused the said Bruni to be arrested in a proper legal manner.

The first question is, as to the regularity of the application made to the magistrate.

It appeared on the investigation, by the testimony of Anthony Borg, that the captain of the Philadelphia called at the French consulate, in company with the consignee of the ship, and requested the witness to make an application for the restoration of Bruni, as a deserter. That he filled up a form, affixed the official consular seal to it, and signed it for the vice consul. That this was at about ten o'clock in the forenoon; that neither the consul nor the vice consul were present at the time. That he was a clerk in the office of the consulate, and had a general authority from the consul and vice consul to use their official name and seal in such cases. That the vice consul came into the office at about half past eleven o'clock, and on being informed of what the clerk had done, expressed his approbation.

The original application was produced before me, and was, in form, undoubtedly in compliance with the requisitions of the statute. But it was contended by the counsel for the relator that it was invalid, because it was made by the consul through

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his agent, (although legally authorized for that purpose,) instead of being made by himself or the vice consul in person.

What was the character of the application? It was a simple ministerial act of the most ordinary kind. A mere request, requiring neither judgment, skill, nor ability to make it. As a general rule, ministerial authority can be delegated, unless there is some law, or some rule of policy, to the contrary. In this case the application determined nothing, and proved nothing. It did not constitute any part of the proof to be made before the magistrate, and was sufficient, according to every rule of policy, whether made by the consul in person, or through his duly authorized official agent. It was issued from the consulate, under the official seal of the consul general, by an authorized agent, and stated that "the consul general requested," &c. and was afterwards ratified by the vice consul. This it seems to me was a sufficient application by the vice consul, within the spirit and meaning of the treaty and of the act of congress.

The second inquiry is, was the proof before the magistrate sufficient to authorize the arrest of the relator?

It appeared before me that the *réle d'équipage*, (or list of the crew,) of the ship was exhibited to Justice Drinker, at the time that he issued his warrant, and that Bruni's name was upon it. But it was contended that, although his name was upon this list of the crew, still he was not one of the crew, because he is called *domestique*, and not "seaman" or "sailor." It will be remembered that all that the statute requires is, that it shall appear from the official document of the vessel, that the person named belonged, at the time of the desertion, to the crew of the vessel. Nothing is said about his being a seaman or sailor. The official document, in this case, was the *réle d'équipage*, (or list of the crew;) and if Bruni's name appeared on this list, that was all that the statute required.

Third. Was Justice Drinker a magistrate, with competent power to issue warrants, within the provision of the statute? This was not denied on the argument; but it was contended that the act itself is contrary to the provisions of art. 3, § 1, of the constitution of the United States, which declares that "the

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judicial powers of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." And that Justice Drinker being a state magistrate, the power could not be vested in him. The answer to this is, that this is not a judicial power of the United States; (*Const. U. S. art 3, § 2; 3 Story's Com. on Const. § 1639, 1640;*) that similar powers have been exercised by state magistrates with general approbation of the law; (*Conklin's Tr. 400;*) and I shall not take it upon myself, after the law has been acted upon and acquiesced in for nearly twenty years, to decide that it is unconstitutional.

As to the last subject of inquiry, it was contended that the warrant issued by the magistrate was not in the proper form. The statute does not say that the magistrate shall issue a warrant, but that "it shall be his duty to cause the said person to be arrested." The process used by Justice Drinker, in this case, was what is ordinarily called a warrant. There is no doubt that it contained all that was necessary to make a legal arrest; if it contained more, that was mere surplusage.

It was also contended that the arrest was illegal, because the warrant was issued without oath. The statute says nothing about an oath, and the warrant issued by Justice Drinker was not a process of the character alluded to by the constitution of the United States, as was urged by the counsel. (*Amendments to Constitution, art. 4.*)

If I am correct in these views, there was no want of jurisdiction in the magistrate who issued the process of commitment under which the relator was detained and imprisoned. The writ of habeas corpus must therefore be dismissed, and the said Paul Bruni remanded to the custody of the keeper of the city prison.

A writ of certiorari was then sued out of the supreme court, under the statute, (*2 R. S. 3d ed. 668, § 84,*) to bring up for review the proceedings before Judge Edwards.

Before this writ was returned, application was made *ex parte*, at the special term of the supreme court held by Judge Edwards, for a writ of certiorari to bring up for review the proceed-

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ings before Mr. Drinker, the special justice. Judge Edmonds made an order that the writ issue, unless cause to the contrary be shown, on the following Monday; staying proceedings on the commitment of the special justice in the meantime, and directed that a copy of the order be served on the French vice consul and the keeper of the city prison. On the following Monday argument was had, and the writ was denied on the ground stated in the order, viz. "that this court (the supreme court) has no jurisdiction to grant the said writ; the said Drinker having acted under an act of congress and as an officer of the United States." The order was entered, however, without prejudice to any new application for the said writ, upon the same or other papers, at a general term of this court. The following is the opinion delivered by Judge Edmonds, on that occasion.

EDMONDS, J. I do not see how this court has any power to review the action of Justice Drinker in this case. Although he is a state officer, deriving his office from state appointment, yet he is *pro hac vice* an officer of the United States, deriving all his authority in this matter from the United States, acting under a law of the United States, in execution of a treaty of the United States.

In such cases we have no authority to interfere. The power of reviewing the justice's action is in the tribunals of the United States, and in them alone. When he acts as a magistrate appointed by the authorities of the state, in execution of state laws, we have supervision over him; but when he acts in execution of the laws and treaties of the United States, whether his power to act is conferred upon him either individually, by name, or by virtue of his local office, he is still an officer of the United States in that case, and amenable only to its tribunals for supervision. We have therefore no power to interfere to review his decision. Certiorari denied.

The counsel for Bruni immediately applied, *ex parte*, at the general term, and read the same affidavit of Bruni which was used in the first instance at the special term, the order and opin-

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ion of Judge Edmonds, and stated generally the nature of the case, and what had taken place at the special term ; and asked for an order to show cause why the writ should not issue, with a stay of proceedings in the meantime.

The court, after hearing the general merits of the case explained, *granted the writ in the first instance.*

The writ to Judge Edwards and the one to the special justice were both returned and filed at the same time ; upon which the court designated a day on which they would hear argument on both.

The attorney of the French consul then gave notice of a motion to quash the writ issued to the special justice ; and the motion was brought on in the morning of the day for which the hearing of the certiorari was set down. This motion was first heard.

E. Sandford, for the vice consul. I. The application to the court for the writ was irregular. It should have been made on notice. (12 *Wend.* 292.) II. The court will not exercise its discretionary power, unless good cause is shown, and it appears that the committing magistrate has done injustice. The policy of the act of congress, and the treaty, is against granting the writ. III. The supreme court of this state has no power to review the decision of Justice Drinker. He was acting under the constitution and laws of the United States, and was *pro hac vice* an officer of the United States. The power of this court to review the proceedings of inferior tribunals, to see that they keep within their jurisdiction, is limited to tribunals subordinate to them. Justice Drinker did not act as a tribunal inferior to this court, but as a tribunal inferior to the supreme court of the United States, and is subject only to its appellate power. He was not compelled to take cognizance of the case ; but having done so, he is responsible only to the courts of the Union, whose laws he has executed. IV. The powers given to Justice Drinker by the laws of this state are mere *qualifications* in him to exercise the powers given by the United States, to persons who are thus qualified. What he has *done* has been under an act of

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congress. Whether he has rightfully exercised that authority this court cannot determine.

V. The power of this court to remove by certiorari is co-extensive with its power of mandamus and prohibition, which can be issued only to its inferior tribunals.

D. D. Field, for Bruni. I. It is in the discretion of the court to issue the writ in the first instance, or to grant an order to show cause. The exercise of the discretion will depend upon the particular circumstances of each case. It was necessary in this matter to act without delay, if the removal of Bruni from the country was to be prevented. II. Leave having been given to apply at the general term, it was regular to make the application here in the same manner as it was made at the special term, *ex parte*; which was done, and a similar order asked for. III. The supreme court of this state has jurisdiction to issue the writ of certiorari to bring up the proceedings of Justice Drinker for review. 1. The jurisdiction of this court, like that of the king's bench in England, extends to all persons residing in the state, or owing allegiance to it. (20 *John*. 430. 3 *Hill*, 42. 1 *Paige*, 548.) As to the jurisdiction of the king's bench, see 3 *Bl. Com.* 42; *Bac. Abr. Certiorari*. The only qualification of this rule is, that it shall not be exercised so as to control the courts or officers of the Union. The two governments are independent in their respective spheres; and neither can dictate to the other. (3 *Story's Com. on Const.* § 1751.) 2. If it were a general principle that this court could not interfere with an act of a state magistrate done pursuant to a law of the Union, yet when, as in this case, that act is done in the name of the people of this state, by the writs of the people, directed to the executive officers of the people, the state, through the courts, must have some control over the acts, the process, and the execution. The right of the state to control their own writs, and the execution of such writs by its own constables and policemen, seems indisputable. 3. The objection to the jurisdiction of this court, upon the general principle, assumes that Drinker was really, for the occasion, a general officer of the United

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States, exercising the jurisdiction with which he is clothed by congress, and over whose acts in that respect this state has no control. Neither of these assumptions can be supported. (1) He was not really, even for that occasion, a judicial officer of the United States, but a state magistrate, administering an act of congress. The proceeding is either civil or criminal. If civil, the parties are pursuing the remedy granted by congress in the local courts. If criminal, the government is commencing a prosecution against offenders, in aid of the French tribunals. In either case, the court is ours, and the authority is ours; while the right comes from congress. The acts of the magistrate were done by him as a justice of the state and *virtute officii*. Any other construction would oust our courts of appellate jurisdiction in all cases of prosecution in our courts under acts of congress; and even the case of *The United States v. Lathrop*, (17 John. 4,) could not have been carried to the court of errors if the parties had wished it. (2) He was not exercising the jurisdiction conferred by the act of congress. This is a point in controversy. It is one of the very reasons for which we ask a certiorari. We contend that he has not pursued the act of congress, and therefore has acquired no jurisdiction under it. It is the case of an officer of this state exercising an usurped power. He is as much unsupported by the act of congress, as if he had seized any stranger in the city. In any other case of usurped power—for example, an attempt to put in force here, under the forms of law, an act of the British parliament or the French legislature—this court would interfere. It is beyond dispute that a certiorari is a proper remedy though the act complained of is wholly void through defect of jurisdiction. (*Starr v. Trustees of Rochester*, 6 Wend. 564.) (3) The state has control over him, because if he acts at all, he acts so far, and so far only, as the state chooses to permit. A state magistrate is not bound to exercise the jurisdiction conferred on him by congress. If he does so, it is voluntary and by the comity of the state. The state gives him permission, express or implied; and such permission necessarily reserves to the state a control over his acts. It is discretionary with the

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state to allow him to act; and therefore the state may control him. If the state had directed him to take jurisdiction, then a *mandamus* from this court would be the proper remedy to compel him to act. If the legislature had given an express permission, subject to qualifications, then a *certiorari* from this court would be the proper remedy to enforce the qualification. The implied permission may be, and doubtless is, subject to qualifications. If so, the writ is proper. In any view, this court must have the right to examine his proceedings by *certiorari*; and if the record may be brought here for any purpose it is enough. (4) If the federal government comes into the state court to enforce its laws, it submits itself to the *lex fori*, and must take the course of proceedings, and the chances of appeal, it finds there. Under the act of congress, the sessions and this court, even, might have been applied to as well as Justice Drinker. In that case could there have been no review?

CADY, P. J. delivered the opinion of the court. It is in the discretion of the court either to issue the writ of *certiorari* in the first instance, or to grant an order to show cause. The application in this case was regular, and the writ was properly issued, we have no doubt that this court has power to review the proceedings of Justice Drinker on *certiorari*. This court can control the writs of the people of this state; even though the justice acted without authority. We will hear argument on the return of the *certioraris*.

Judge *Edwards* sent up, with his return, copies of the petition for the *habeas corpus*, the writ issued by him, the return thereto, Bruni's answer to the return, the application to the special justice for the arrest of Bruni, the warrant of arrest issued by the justice, the warrant of commitment, and the extract taken before him from the *rôle de équipage* of the French steamship on which Bruni was designated as "*domestique*." He did not return the evidence taken before him.

Justice *Drinker*, in his return, certified the application made by the vice consul to him, the warrant of arrest, the warrant of

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commitment, and the extract from the *rôle de equipage* left with him; and then went on to state—"And I further certify that no other order or process was made by me in relation to the said Paul Bruni, except the said papers marked B. and C. (the warrants of arrest and commitment given above,) that previous to the issuing the said warrant marked B." (*the warrant of arrest*) "a paper was exhibited to me which I was satisfied from inspection was the *rôle de equipage* of the steamship Philadelphia, upon which appeared the name of the said Paul Bruni designated as a "*domestique*" engaged for the voyage.

* * * * *

"And I further certify, that it was made known to me, by the keeper of the city prison, that the said Paul Bruni had been arrested pursuant to my warrant marked B." (*the warrant of arrest*) "on the evening of the 11th of August last, and lodged in the city prison (late at night time,) and accordingly on the morning of the 12th of August last aforesaid, I caused the said Paul Bruni to be brought before me; when I duly examined him, and told him he was charged with being a deserter from the steamship Philadelphia. I asked him what he had to say in relation to the charge; that he admitted and said that he had deserted, and assigned as a reason therefor that he had been cruelly treated by the captain of the said steamship. I thereupon, pursuant to such examination, made the warrant of commitment hereunto annexed marked C. (given above.) I return herewith all the papers and proofs on file in this office, or which were had or taken before me in this case."

"All the papers and proofs" consisted of the above papers certified and the above examination of Bruni.

Both certioraris were argued together.

D. D. Field & David P. Hall, for Bruni. I. The act of congress confers no jurisdiction upon any state officers or magistrates. The act says it shall be "the duty of any court, judge, justice, or other magistrate," &c. It is therefore obligatory upon the court, officers, and magistrates named in it; and for disregarding its obligations there must be some means of

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redress. The United States cannot control or punish the state magistrate. II. Justice Drinker being a state magistrate, and the duty imposed by the act being judicial, he could not exercise it. 1. That the duty imposed was judicial is clear. The magistrate is to examine and decide upon law and fact in a controversy between the French vice consul, on the one hand, and the alleged deserter on the other. (*United States v. Lawrence*, 3 Dall. 42.) 2. No portion of the judicial power of the United States can be vested in a state court or magistrate. (17 John. 4. *Houston v. Moore*, 5 Wheat. 1. 7 Conn. 244. 1 Kent's Com. 396, 404, 2d ed. 3 Story's Com. § 1749 to 1754. *Case of Jos. Almeida, decided by Chancellor Bland of Md., reported at length in Niles' W. Reg. Ex parte Pool*, 2 Virg. Cas. 276.) III. If, however, Justice Drinker could exercise the jurisdiction, it was of a special and limited kind, and in derogation of common right. It must, therefore, be strictly pursued, and appear to be so on the face of the proceedings. (2 Wils. 386. *Mills v. Martin*, 19 John. 33. *Matter of Sweatman*, 1 Cowen, 144. *Bowman v. Russ*, 6 Id. 234. *Reynolds v. Orvis*, 7 Id. 269. *Gallatin v. Cunningham*, 8 Id. 370. *Latham v. Edgerton*, 9 Id. 227. *Thomas v. Robinson*, 3 Wend. 268. *Bloom v. Burdick*, 1 Hill 130. 3 Id. 661, 666, note n. 7 Id. 35, 44.)

IV. The final order and process for the detention of Bruni was, on its face, defective, in the following respects: 1. Because it did not set forth the facts necessary to show jurisdiction in the justice. (*King v. Inhab. of Wolcott*, 6 T. R. 583. *Powers v. The People*, 4 John. 292. 8 Conn. Rep. 482. 10 Id. 514.) General averments of any proceeding are not sufficient. (*Van Etten v. Hunt*, 6 Hill, 313, 314. *People v. Roeber*, 7 Id. 39.) 2. It was issued in the name of the people of this state, and directed to a constable and the keeper of the city prison, two state officers. It should have been issued in the name of the president of the United States, and been directed to the marshal of the United States. 3. It directed the detention of Bruni in the city prison. This is a public prison for confinement of prisoners on criminal charges, and cannot

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be used for any purposes except such as is authorized by the laws of this state. The laws of the United States require all prisoners to be detained by their marshals, except so far as the states have conceded the use of their prisons. (*Resolutions of Congress Sept. 23, 1789, and March 3, 1791. U. S. D. vol. 1, 96, 225.*) This state has conceded the use of the sheriff's prison for confinement of persons on civil process "issued by any court of record" of the United States; and the county prison for the confinement of any person duly committed thereto by any court or officer of the United States, "for any offence against the United States;" the United States supporting such person during his confinement. (2 R. S. 443, § 96. *Id.* 773, § 1.) No authority is given, any where, for the use of the city prison to confine persons under the order of a summary jurisdiction like that exercised in this case. 4. The direction to the keeper is to detain him unconditionally; whereas the act authorizes a detention only so long as the vice consul defrays the expense of doing so.

To establish the jurisdiction of Justice Drinker, it was necessary, under the French treaty of 1822, and the act of March 2, 1829, to show, 1. That the consul or vice consul of France made application in writing. 2. Stating that Bruni had deserted from a French vessel *while in a port of the United States*. 3. That proof was then made by the ship's register, roll, or other official document, that Bruni was a sailor belonging to the crew of the Philadelphia, at the time of the desertion. 4. That a legal warrant was issued for his arrest, and that he was brought up for examination. He could not be arrested by parol authority, or by a void process. 5. That an examination was had, and upon it the facts stated in the application and ship's register were found to be true, and that thereupon the final order or process was made.

V. If the final order or process were good on its face, the rest of the record shows a fatal defect in the jurisdiction, in every one of the foregoing particulars. 1. The application was not made by the consul or vice consul. The statute must be strictly complied with. These officers were named because their sta-

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tions and characters were supposed to form a guaranty against an improper application. It was a power vested in them requiring discretion and judgment. Their authority could not be delegated. It was not merely mechanical, but required discretion and judgment; and in such case authority cannot be delegated. (1 *Hill*, 501. 26 *Wend.* 485. *Story on Agency*, 12, 14. 3 *Hill*, 53.) 2. The application did not state that Bruni had deserted *while in a port of the United States*. This was necessary to be stated. (11 *Wend.* 648. 6 *Hill*, 314.) 3. There was no proof, by the exhibition of the ship's register, roll, or other official document, that Bruni was a sailor belonging to the crew. (1) There is no evidence that any document was exhibited at all. Drinker says a paper was exhibited to him which he was "*satisfied from inspection*," was the rôle de équipage. That is scarcely legal evidence of its being the rôle de équipage. (2) But if it were the genuine document, it did not show Bruni to be a sailor, or to belong to the crew. To show both was necessary. The treaty is explicit, "*sailors being part of the crew*." The act was intended to be co-extensive with the treaty. *Sailor* has a definite technical signification; and means one of the common hands engaged in navigating the vessel. Neither the captain nor mate is included. (7 *Conn. Rep.* 240.) The consular convention, after which this section appears to have been framed, had the words "captain, officers, marines, sailors and all other persons being part of the crews of their respective nations." The present treaty omits all but the sailors, and is confined to them. What did the rôle de équipage in this case show? That Bruni was a *domestic*. That is not a sailor. The question is not whether his service was maritime, so that he could sue in the admiralty for his wages; though that is doubtful; (*Gilpin's Rep.* 516;) but whether he is a sailor in the sense of the treaty and statute. (*Curtis on Seamen*, 6.) 4. Bruni was not brought before Drinker on a legal warrant. The warrant issued was illegal, because, (1) It did not set forth the facts necessary to show jurisdiction to grant it. (2) It was issued without oath or affirmation. A warrant cannot properly issue without an oath or

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affirmation. (*4th Amend. Const. U. S. Ex parte Burford*, 3 *Cranch*, 448.) (3) It was issued in the name of the state, and to state officers. (*Conk. Tr.* 400.) 5. No examination, within the meaning of the act, was had when Bruni was brought before the justice. This fact appears upon the return of Justice Drinker, and is a good objection in that matter. The examination contemplated by the act is a legal investigation of all the facts involved in the case, and of which some record should be made. (11 *Wend.* 399. 3 *Wils.* 380.)

E. Sandford & F. R. Tillou, for the French vice consul.

I. The proceeding before Justice Drinker was not of that character which, under the constitution of the United States, it was imperative upon congress to vest in tribunals of its own creation. 1. The state courts may, in the exercise of their ordinary and rightful jurisdiction, take cognizance of cases arising under the constitution, laws, and treaties of the United States. 2. The judiciary act of 1789 shows that, in the opinion of congress, the grant of jurisdiction is not sufficient to vest an exclusive jurisdiction. Unless there be some clause of exclusion in the acts of congress, they are to be regarded as permitting jurisdiction over the subjects therein described, to be exercised by the state courts and magistrates. (1 *Kent*, 398. 17 *John.* 1. 14 *Id.* 95.) II. The writ of certiorari brings up nothing but the record. The only question to be determined upon it is, whether the officer had jurisdiction. The facts cannot be examined into, and if appearing upon the return, cannot be regarded. (25 *Wend.* 157.) 1. The correctness of Justice Drinker's decision cannot, therefore, be enquired into: if by a proper application of the vice consul he once gained jurisdiction, he did not lose jurisdiction by any subsequent erroneous decision. (6 *Wend.* 564.) 2. A re-investigation of the facts and merits cannot be had, unless authorized by statute. The writ to Drinker is a common law certiorari. The justice's decisions are therefore final in all questions of fact, so far as this court is concerned. (2 *Chit. Gen. Pr.* 375. 19 *Wend.* 342.) III. The

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return shows that the justice obtained jurisdiction of the subject matter, and of the person.

As to the subject matter. 1. The seal of the consulate affixed to the application proved it to be the official act of the consul. No other attestation was necessary. 2. The 4th amendment of the constitution of the United States, relates only to search and criminal warrants, and is not applicable to a case like this. 3. The presence and direction of the consul will be presumed. (21 *Wend.* 178.) 4. If the court can infer that the consul was not present, and that the application was signed by his deputy or clerk without his direction and personal presence, it was a mere ministerial act of the most ordinary character, and could be performed by deputy. (9 *Coke's Rep.* 47, 49. 10 *Paige*, 232, 33. *Sewell's Law of Sheriffs*, 33, 41. 21 *Wend.* 178.) 5. It is evident that the desertion took place in a port of the United States. The application was made at New-York, on the 6th of August, and alleges the desertion on the 3d of the same month. The desertion in that time could not have been in any port out of the United States.

As to the person of Bruni. 1. The justice obtained jurisdiction of the person of Bruni. He was brought up on the warrant. Being before the justice, he submitted to an examination, and that gave the justice jurisdiction to determine the principal question. (7 *Cowen*, 271, 2.) 2. Though Bruni was a domestic on board the steamship, he was a "part of the crew" within the meaning of the act of congress. The term *seaman*, in the act, is generic, intended to include all who enter into the maritime contract. The language "part of the crew" is intended to denote the persons who have deserted, and not the sailors who may desert. 3. The treaty does not intend an inquiry before the magistrate into the particular character of the service contracted for, on board. In respect to this, he is under the control of the master. Although he may have shipped as a domestic, he may have been obliged to toil at the ropes. 4. The exhibition of the roll forms the right of the magistrate to demand if the person be one of the ship's crew, registered as such. If an inquiry is to be had beyond this, the

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exhibition of the roll is an idle ceremony. 5. The object declared by the 6th article of the treaty is to "render every necessary assistance." The voyage may be retarded by the desertion of one person or another. All are equally bound to perform their contract. The sovereignty of France is to be maintained in her vessels, and over their crews, whilst in our ports.

IV. Justice Drinker could issue the warrant either to the marshal of the United States or to any constable or officer of this state. The section of the judiciary act conferring power on state magistrates provides that it may be exercised "agreeably to the mode of process against offenders in such state." This was done in this case. (*Conklin's Tr.* 405.)

V. The final order or warrant of commitment shows sufficient on its face. It refers to the statute under which the justice acted, and adds that the facts stated in the warrant are true. This is sufficient.

VI. The commitment to the city prison was proper. The state has conceded the use of the prison for the confinement of any person duly committed thereto for any offence against the United States. The act of desertion may be deemed an offence against the United States; inasmuch as it tends to impair the effect of its treaty stipulations. (*See act of April 15, 1814; Laws of New-York relating to the city of New-York, 21.*)

HURLBUT, J. delivered the opinion of the court. This matter comes before us upon two writs of certiorari, the one bringing up the proceedings of Justice Drinker for review; the other the proceedings before Judge Edwards. The important question, and perhaps the only one we are called upon to decide, is whether Justice Drinker had any jurisdiction of the subject matter, or of the person of Bruni. In the first place, does the statute of the United States of March 2, 1829, under which Justice Drinker assumed to act, apply equally to officers of this state and of the United States, or to those of the United States solely? In our judgment the act cannot be held to devolve any power upon the officers of the states, unless they are in express terms included in its provisions. The expression of the

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statute, "any court, judge, justice or other magistrate having competent power to issue a warrant," can be fully answered only by the courts and officers of the United States. Indeed, the United States, in passing a statute devolving upon any officers particular powers and duties, must, in the absence of any expressions to the contrary, be considered as referring to their own officers alone.

We are unanimously of opinion it was never intended by congress, in the present statute, to confer power upon any but courts and officers of the United States; and that no court, judge, justice, or other magistrate of this state can assume to execute its requirements.(a) The statute says "*it shall be the duty of any court,*" &c. It is mandatory on the officer or court, and if they neglect or refuse to perform the duty, it is to be supposed they can be made amenable for such neglect or refusal: and yet no power exists in the general government to arraign a state officer in a matter like this. When congress designs to delegate duties and powers to officers of the United States, the expression here used is proper: when it intends to include state officers the language is, "It shall and may be lawful," &c. Thus in the naturalization act it says "it shall and may be lawful" for any court of record to entertain the proceedings, &c.

We hold therefore that this act of congress confers power only upon courts and officers of the United States: and as in every part of the country where a case of this kind can arise there are United States officers, neither public policy nor the meaning of the statute require that the power should be exercised by the officers and courts of this state.

But if the court had any doubt on this subject, which it has

(a) In the case of *The British Prisoners*, (1 Wood. & Minot's Rep. 66,) in the circuit court of the United States for the first circuit, it was decided that under the treaty with *Great Britain*, of August, 1842, prisoners charged with piracy, committed contrary to acts of parliament, and on board a British vessel, may be arrested here, and examined; and if believed to be guilty, they may be ordered into custody with a view to a future surrender. And that this may be done by a state magistrate; though he is not compellable to do it, by the United States.

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not, there is another ground fatal to the proceedings below. Admitting that Justice Drinker was an officer such as was intended by the act of congress, we find on looking at the records returned, it is no where alleged that Bruni deserted from the French steamship *while in a port of the United States*. Without this appearing, Justice Drinker obtained no jurisdiction, even if he had a right to act in any case, under the statute. This defect itself, apart from any other considerations, nullifies all the proceedings of Justice Drinker. For these reasons, without considering the many other questions which were so ably discussed by counsel, it appears to us that the proceedings of Justice Drinker ought to be set aside. And in the case of the certiorari to Judge Edwards, the order of that officer must be reversed and Paul Bruni be discharged.

Ordered accordingly.

NEW-YORK SPECIAL TERM, October, 1847.

Edmonds, Justice.

CONNAH vs. SEDGWICK and others.

Under the provisions of the statute, unless an assignment made by a debtor for the benefit of his creditors, is accompanied by an immediate delivery of the assigned property, and is followed by an actual and continued change of possession, courts are bound to presume it fraudulent and void as against creditors, and to regard it as conclusively so; unless they are satisfied that it was made in good faith and without any intent to defraud.

What amounts to a delivery, and an actual and continued change of possession.

Continuing to carry on the business of the assignor, in the same way in which it was conducted prior to the assignment, retailing the goods, replenishing the stock from the proceeds of the sales, and keeping no account of the sales of the assigned property, amounts to a breach of trust, which will authorize the appointment of a receiver.

The insolvency of the assignee is also a good cause for the appointment of a receiver of the assigned property.

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The selection of an insolvent person as assignee is a fraud upon the rights of creditors, and evidences an intention on the part of the assignor to delay and hinder them, in the collection of their debts.

IN EQUITY. The bill in this cause was a creditor's bill, filed against R. Sedgwick, jun., the judgment debtor, and R. Sedgwick his assignee. The judgment debtor is a son of the defendant R. Sedgwick; and after his failure he executed an assignment of all his property to his father, in which he gave the latter a preference for a large amount, in the payment of the debts owing by him. The bill charges that the assignment was fraudulent; that the assignee is insolvent, and that there has been no change of possession as to the property assigned. And it prays for an injunction and receiver, and that the assignment may be set aside.

A. F. Smith, for the complainant, moved for the appointment of a receiver of the assigned property. He insisted that fraud was sufficiently charged in the bill to render the appointment of a receiver proper. 1. The assignee is notoriously insolvent. This has been held to be *prima facie* evidence of fraud. (*Reed v. Emory*, 8 Paige, 417.) 2. The assignor has remained in possession of the property, carrying on the business, selling the goods, and receiving the money therefor, in the same way as before the assignment. *Hart v. Crane*, (7 Paige, 37,) decides that a provision directing the business to be carried on, renders the assignment fraudulent. And the principle is the same whether the business be continued by the assignee, or by the assignor himself. Justice to other creditors requires that after an assignment has been made for their benefit, the business shall be wound up, and the property disposed of.

R. H. Waller, for the defendant. The answer states that the assigned property was not left in the possession of the assignor. Although he was in the store constantly, it was in the capacity of a clerk, only. But had the property been left in the assignor's possession this would not have been conclusive evidence of fraud. It would only have been presumptive evi-

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dence. (2 R. S. 3d ed. 195, § 5. *Id.* 198, § 4. *Stoddard v. Butler*, 20 Wend. 507. *Smith v. Acker*, 23 *Id.* 653.) Fraud, in such cases, depends upon the intent. (1 *Hill*, 438, 467, 473. 25 Wend. 511. 4 *Hill*, 271.) And the question of intent is not to be determined by the court, but must be submitted to the jury. (*Butler v. Van Wyck*, 1 *Hill*, 438. *Prentiss v. Slack*, *Id.* 467. *Fuller v. Acker*, *Id.* 473. *Cole v. White*, 25 Wend. 511. *Hanford v. Artcher*, 4 *Hill*, 271.) The facts charged in the bill are stated upon belief, only ; and are therefore insufficient to authorize an injunction ; much less the appointment of a receiver.

EDMONDS, J. There can be no occasion to consider the objections made, that the statements of the bill are on information only, and that the affidavits annexed are defective in point of form ; because the answer itself states three facts which are of themselves sufficient to warrant the granting the motion for a receiver.

1. The change of possession. Under the provisions of the statute, unless the assignment was accompanied by an immediate delivery of the assigned property, and is followed by an actual and continued change of possession, I am bound to presume it fraudulent and void as against creditors, and to regard it as conclusively so ; unless I am satisfied that it was made in good faith and without any intent to defraud.

If then, in any aspect, I am bound to look upon it as void, nothing can be more right or consonant to the well established practice of this court, than, on such a bill as this is, to direct the appointment of a receiver to take charge of the property, to abide the result of the inquiry whether it was actually fraudulent.

The question then is, was there, in point of fact, an immediate delivery and an actual and continued change of possession ? Aside from the general averments in the answer, which are of no avail here, because they are rather allegations of conclusions of law than a statement of matters of fact, the only facts set up in the answer to show a delivery and change of possession

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are these, that the junior was erased from the sign, and the son was made subordinate to the female clerk. The assignee did not himself go into and continue in the actual possession. He did not himself attend the store and superintend its operations. He was as usual attending to his own affairs in another part of the town, and for a period of about three months after the execution of the assignment, the business was carried on at the store in the same manner as it had been before. Goods were bought and sold and money received and expended by the assignor and the female clerk; and for a part of the time by the assignor alone, in the absence of the female. During this time, the property may be said to have been constructively in the possession of the assignee, but it was actually in the possession of the female clerk and the assignor; and part of the time it was actually in the possession of the assignor alone. These are the plain facts of the case, and unless I strike the word actual out of the statute, or give it a meaning different from that which it has always borne in law, as well as in common parlance, I am bound to presume the assignment to be fraudulent and void.

2. The next matter of fact stated by the answer, is the continuance of the business without interruption since the assignment. The admission in the answer is that R. Sedgwick, jun., ever since the making the assignment, with the exception of a few days, has been and still is in daily attendance at the store as clerk and not as owner—that the store has been opened as usual, and small parcels of the assigned stock have been from day to day, by the female agent and R. S. jun. as such clerk, retailed out in the usual course of business, and in the same manner as if no assignment had been made; that of the proceeds of such business, about \$414 have been paid by his agent (the female clerk) to the assignee, and \$350 thereof has been applied to replenishing the stock; but what articles have been so purchased the assignee does not know, nor does he know or believe that any account has been kept, nor does he know what part of the assigned property has been sold. The object of the assignment is to pay the debts of the assignor, first some preferred

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debts, among whom is the assignee, and then his individual, and afterwards his partnership debts. The case of *Hart v. Crane*, (7 *Paige*, 37,) is precisely in point. It is on all fours with this case, in this respect; and on that authority I am bound to regard this dealing with the property as a breach of the trust, and therefore, enough in this case, as it was in that, to warrant the appointment of a receiver of the assigned property.

3. The insolvency of the assignee. In his answer he admits that he has been for a long time in embarrassed circumstances; that he cannot form any opinion whether he is now able to pay his debts, and does not know whether he is insolvent or not; but he admits that there are judgments to a large amount outstanding against him, and that one execution at least had been issued against him, and that all his household furniture is covered by a chattel mortgage. Here again, a decision in chancery, *Reed v. Emery*, (8 *Paige*, 417,) is decisive of this case. The chancellor there held that an assignment to one who was known to be insolvent, was at least prima facie evidence of an intent to defraud creditors; that it was the duty of the assignor, as an honest man, to select one whose circumstances were such as to afford a reasonable assurance to the creditors that the fund would be safe in his hands; and that if the debtor, in such case, selects one who is known to be insolvent, it is a fraud upon the rights of creditors, and evidences an intention to place his property beyond their reach, or, in the language of the statute, to delay or hinder them in the collection of their debts. Therefore he not only refused to dissolve the injunction, but directed the appointment of a receiver of the assigned property, or the proceeds thereof.

The same course must be taken in this case.

SAME TERM. *Before the same Justice.*

CLARK *vs.* BROWN.

It is not a matter of course to allow a party to turn a case into a bill of exceptions. On a case, the decision of the supreme court is final ; but on a bill of exceptions, the parties can carry the cause to the Court of Appeals. Whether they shall be allowed to do so must depend upon the gravity of the case, and the nature of the questions involved.

A witness will not be allowed to disqualify himself, and thus deprive a party of the benefit of his testimony, by his own declarations showing a bad feeling against the opposite party.

THIS was an action on the case for obstructing a private right of way, by erecting a gate at the end of a lane running along by the side of, and adjoining, the plaintiff's land. The cause had been tried previously before two juries, and on each occasion a verdict was rendered for the defendant. These verdicts were set aside by the supreme court, and the cause sent back for a third trial. In each instance, the court decided that the plaintiff made out a clear right of way. On the third trial, a verdict was rendered for the plaintiff. Upon this trial, the defendant, for the purpose of showing the existence of a particular estate during his minority, offered in evidence a copy of the probate of a will, after having shown the loss of the original. And to show that there was no acquiescence in the plaintiff's claim, on the part of the defendant, his counsel offered to prove that on one or two occasions the defendant denied the plaintiff's right of way. The defendant also offered to prove that one of the plaintiff's witnesses, Mrs. Strang, entertained bad feelings towards him. All this evidence being disallowed by the circuit judge, exceptions were taken to his decisions. A case was then made, which it was agreed might be turned into a bill of exceptions. It was however argued before the supreme court as a case. That court directed the verdict to be amended, so that it should be in favor of the plaintiff upon the first count, and for the defendant upon the other two.

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J. W. Tompkins, for the defendant, now moved to turn the case, which had been argued, into a bill of exceptions ; in order that the points of law therein involved might be brought before the Court of Appeals. He also moved for a re-taxation of the costs ; upon an affidavit showing that the defendant's counsel, who resides at White Plains, did not reach the city of New-York, where the taxation was had, until about half an hour after the bill had been taxed ; and that although he requested that a re-taxation might be had, and offered to pay the costs thereof, the plaintiff's counsel refused to consent thereto.

E. Sandford, for the plaintiff. The defendant had his choice either to make a case or a bill of exceptions. By choosing to do the former he has made his election, and he is bound by it ; especially after having gone so far as to bring the case to argument, and getting the decision of the court thereon. It is too late to make this application now. (*McFarlane v. Ulster Co. Bank*, 5 Hill, 432. 1 John. Cas. 492, n. 1 How. Pr. Rep. 8, 42.) And it is not a matter of course for the court to grant such an application, even if made in season.

EDMONDS, J. It is not a matter of course to allow a party to turn a case into a bill of exceptions. On a case, the decision of the supreme court is final, but on a bill of exceptions, the parties can go to the court of dernier resort. And whether they shall be allowed to do so, must depend upon the gravity of the case, and the nature of the questions involved.

The question involved in this case, is whether the plaintiff has a right to use a lane without a gate, his right to use it with a gate being undisputed. This is scarcely of importance enough to go to the Court of Appeals with ; especially after the case has been three times tried at the circuit, and three times argued before the supreme court.

Nor can I conceive that there are questions of law in the case, of sufficient importance to justify or warrant a review. The first question of evidence does not involve any matter of principle, but merely what was meant by the language in which the

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defendant clothed his offer of proof. The second question, as to the offer to prove that the defendant had denied the right of way, is of no moment; for the right of way was not sought to be founded on an acquiescence, but upon an adverse possession. And the third question of evidence, viz. the offer to prove that the witness, Mrs. Strang, had said that she had bad feeling towards one of the parties, is not worthy of review, because the exclusion of the evidence was clearly right, on the familiar principle that a witness shall not be allowed thus to disqualify himself, and deprive a party of the benefit of his evidence.

The motion for leave to turn the case into a bill of exceptions must, therefore, be denied. There must, however, be a re-taxation of costs, not as a matter of right, but from the suggestion that there were errors in the former taxation. On such re-taxation, the plaintiff may include any items not in his former bill, which are properly taxable, and also his costs of opposing this motion.

SAME TERM. Before the same Justice.

MALLETT vs. THE WEYBOSSETT BANK and DEXTER, administrator, &c.

THE SAME vs. THE BANK OF NORTH AMERICA and DEXTER, administrator, &c.

If, from the matter of a bill itself, it appears that the plaintiff has an adequate remedy at law, an injunction cannot be sustained on such bill.

The rule that where there are several defendants who are implicated in the same transaction the answers of all must be perfected, before either of them can move to dissolve an injunction, is not inflexible; but has its limitations and qualifications. One important one is that the plaintiff must have taken the requisite steps to compel an answer from all the defendants.

So where the defendants on whom the real gravamen rests have fully answered, they may apply to have the injunction dissolved, as to them, although a co-defendant has not put in his answer; especially if he is a non-resident and cannot be compelled to answer.

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Another qualification of the rule is, that it is applicable only to an injunction properly granted.

IN EQUITY. The above named banks commenced their suits at law to recover of Mallett, as maker, the amount of two promissory notes, endorsed by one Fenner, on whose estate Dexter had taken out letters of administration. Mallett filed his bills in these suits against the banks and Dexter, alleging that he had an offset of a claim against Fenner; that the notes did not belong to the bank, but in fact to Fenner's estate; and that they were prosecuting them as his trustee. Dexter did not appear or answer; being a resident of Rhode-Island. The banks put in their answers, in which they aver they discounted the notes before maturity, and that the same now belong to them. On the coming in and perfecting these answers,

W. J. Hoppin, for the Weybossett Bank, and *B. D. Silliman*, for the Bank of North America, moved to dissolve the injunctions which had been allowed staying the suits at law. They insisted 1. That conceding the plaintiff's bills to be true, he has an adequate remedy at law. (2 *Story's Eq. Jur.* § 864. *Mitchell v. Oakley*, 7 *Paige*, 68. 2 *R. S.* 354, § 32, *sub.* 10.) 2. That the banks, in answering that they are bona fide holders of the notes, have denied all the equities of the bills. 3. That the bill is entirely on information and belief. (7 *Paige*, 260.)

T. W. Tucker, contra. The defendant Dexter being implicated in the charges of the bill, the motion cannot be made until his answer is perfected. (1 *Barb. Ch. Pr.* 639. *Noble v. Wilson*, 1 *Paige*, 164. *Van Wort v. Williams*, 1 *Clarke*, 377. 1 *Bland*, 190.)

Silliman, in reply. If the remedy at law is adequate, it is immaterial whether Dexter answers or not. And if it is material, the rule is not inflexible, and is never applicable unless the plaintiff shows he has used due diligence to obtain an answer from the defendant; nor when the defendant is a non-resident and no answer can be compelled from him, by either party.

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(*Depeyster v. Graves*, 2 *John. Ch. Rep.* 148. 1 *Smith's Ch. Pr.* 615.)

EDMONDS, J. If, on the matters of the bills alone, it appears that the plaintiff has an adequate remedy at law, it is immaterial who declines to answer; no injunction can be sustained, and the true test is whether, conceding all that the bill alleges, to be true, he can still have his remedy at law. (*Mitchell v. Oakley*, 7 *Paige*, 68.) The plaintiff's bills allege that the banks are not the holders of the notes; that they are prosecuting them for the benefit of Fenner's estate, in fraud of the plaintiff's right to his set-off, and that they are in fact trustees for Dexter, as Fenner's administrator. If this is true, then the plaintiff's set-off against Fenner is perfectly available to him in the suits at law under our statute. (2 *R. S.* 354, § 32, *sub.* 10.) But this is denied by the banks; and thus the whole equity of the bills, as to them, is disposed of: for if they received the notes before maturity, for a valuable consideration paid at the time, as they allege, then the plaintiff has no equity against them. Thus there are two substantial reasons why the injunctions should be dissolved.

The objection that Dexter has not answered, is not available against this motion. It is undoubtedly the general rule that all the defendants implicated in the transaction must answer before either of them can move to dissolve the injunction. But the rule is not inflexible: it has its limitations and qualifications. One important one is that the plaintiff must have taken the requisite steps to expedite his cause. There is no evidence here that any thing has been done to compel Dexter's answer. The bills were filed in June last; and by this time they might have been taken as confessed against him, though he is a non-resident. (*Depeyster v. Graves*, 2 *John. Ch. Rep.* 148.) There is another qualification to the rule, which is mentioned by Chancellor Kent in the case just cited. The defendants on whom the real gravamen rests, have fully answered; and in such a case the injunction will be dissolved as to them. The gravamen as to them in this case is, whether they are bona

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fide holders, or are suing as trustees of Dexter. That part of the bill they have fully answered. Another qualification of the rule is that it is applicable only to an injunction properly granted. So far as these bills are for relief, I have already stated the injunctions were not properly granted; because on the matter of the bills alone the plaintiff had an adequate remedy at law. So far as they were bills for discovery, to aid the defence in the suits at law, the injunctions might have been proper until the discovery was made. The discovery having been made, so far as they are concerned, and their answers having been submitted to, the injunctions become improper in that aspect, and the rule ceases to apply to them.

There is still another view. The rule, if allowed to the extent claimed for the plaintiff, might be made to operate very injuriously. If the endorser had a good defence to a suit against himself on the notes—for instance, if the notes had never been protested—he could, by keeping out of the jurisdiction of the court and refusing to answer, forever stay the holder in his proceedings against the maker. I doubt very much the propriety of carrying the rule to that extent. But it is not necessary to say what would be the precise effect of this state of things. The other grounds I have stated are sufficient to warrant the dissolution of the injunctions.

SAME TERM. *Before the same Justice.*

RANEY and others vs. WEED and others.

After the testimony of a witness has been taken, upon a commission, and the commission returned, the party cannot have a new commission, to re-examine the witness, merely on the expectation that he may now swear more definitely than before; in the absence of any suggestion that the witness has made a mistake, or that new evidence has been discovered.

More especially will such an application be refused where the only other witness who was cognizant of the facts to which the witness is sought to be re-examined is dead.

Raney v. Weed.

THIS was a motion by the defendants for leave to issue a new commission to re-examine one of the same witnesses who was examined under a former commission. One of the witnesses had died since the former commission was returned. The party moving asked a new commission upon the ground that from recent occurrences, the surviving witness would now be able to testify more definitely than before.

T. H. Rodman, for the plaintiff.

H. A. Weed, for the defendants.

EDMONDS, J. With full knowledge on the part of the defendants, as to what the witness Bates could testify to, they issued their commission, framed their interrogatories, and obtained the witness' answer; and now without any suggestions that their witness has made any mistake, or that any new evidence had been discovered, but merely on the expectation that he may now swear somewhat stronger on a point upon which he has been already examined, the motion is to have the witness re-examined. That ought not to be allowed. The practice would be fraught with too much danger; especially where the only other witness who was cognizant of the fact to which the witness is sought to be re-examined has since died. The advantage would be all on one side; and granting the order would give the witness, if he wished, an opportunity of yielding to passion or prejudice in restating his testimony, with entire safety to himself.

Motion denied with costs.

SAME TERM. *Before the same Justice.*

MILLER vs. WILSON and others.

Form of order of reference to settle issues of fact under the 59th rule in equity, preparatory to taking testimony.

IN EQUITY. This was an application on the part of the plaintiff, for an order of reference to settle the form of the issues, under the 59th rule, for the taking of testimony.

C. A. Rapallo, for the plaintiff.

EDMONDS, J. settled the following order ; and announced it as the proper form of the order to be entered in such cases :

AT A SPECIAL TERM, &c.

Present, ———, one of the Justices.

A. B. vs. C. D. and E. F.—On reading and filing the affidavit of ———, solicitor for the above named plaintiff (or defendant,) showing that this cause is at issue upon replications to the answers of all the defendants (or replication to the answer of the defendant C. D., and the bill being taken as confessed against the defendant E. F.,) and is in readiness to take testimony therein, and proving service of notice of a motion to settle the issues of fact joined therein, and on hearing Mr. ———, of counsel for the plaintiff, no person appearing to oppose ; it is ordered that the issues of fact joined by the pleadings pending in this suit between the respective parties thereto be settled pursuant to rule 59, to the end that testimony may be taken thereon. And it is farther ordered that for the purpose of settling the said issues, the pleadings in this suit be referred to ——— as referee to ascertain and settle the said issues in the form of interrogatories to be answered by the judgment of the court thereon, wherein shall be stated the several questions of fact to be passed upon, the names of the parties to each issue, and which party is to be considered as holding the affirmative on each question to be

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tried. And it is farther ordered that said referee do summon before him on such reference all the parties entitled to take testimony in the cause, and that upon the coming in and confirmation of his report the testimony to be taken in the cause shall be directed and be confined to the issues thus settled.

SAME TERM. *Before the same Justice.*

DAVENPORT vs. SNIFFEN and others.

A judge, at chambers, has no power to grant an order extending the time to demur. That can be done only by the court.

After an order has been regularly obtained extending the time to answer, it is irregular for the defendant to demur.

Nor can a defendant, after having obtained an irregular order extending the time to answer, demur while such order is in force, and before the same is vacated.

IN EQUITY. Application by the plaintiff to take a demurrer, filed by the defendants, off the files, with costs. The defendant, within forty days after the service of the bill, obtained an order extending the time to answer, plead or demur. This order being irregular, for having been obtained without affidavit, as required by rule 85, was on application to the court, vacated. After the making of the motion to vacate, and before the decision of the court thereon was announced and the vacatur served, the defendant filed and served a demurrer.

J. E. Burrill, Jun. for the plaintiff. 1. The order for further time to answer, plead or demur, was irregular and void. So far as it was an order for time to answer, it was void, as not having been granted on cause shown by affidavit, as is required by rule 85, in equity. So far as it was an order for time to demur, it was a nullity. (*Burrall v. Raineteaux*, 2 Paige, 331.) Such an order could not be granted by a judge at chambers, under the 85th rule. That rule only authorizes the

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granting of further time to answer, reply, or except. Time to demur could only be granted by the court. (*See Rule 86.*) 2. The order extending the time having been vacated, as being void ab initio, the defendant had no right to demur after the 40 days had expired. He cannot take advantage of his own wrong. 3. If the order was good as an order for time to answer, the defendant could not demur, after obtaining such an order. (2 *Paige*, 331. *Bedell v. Bedell*, 2 *Barb. Ch. Rep.* 99.)

T. E. Tomlinson, for the defendant. A party may demur at any time until he is affected with process of contempt, by the return of an attachment issued against him for want of an answer. (3 *Bro. Ch. Rep.* 372. 2 *Cox's Ca.* 268.) Here the defendant was not in contempt; for no attachment issued until after the demurrer was put in. The order to extend having been irregularly obtained, it was the same as if there had been no order; and the defendant had a right to demur at any time before he was placed in contempt.

EDMONDS, J. The defendant's practice was irregular. A judge, at chambers, had no right to extend the time to demur. That could be done only by the court. And after time to answer has been extended, it is irregular to demur.

But it is insisted that the defendant may put in a demurrer at any time before an attachment is issued; and that as the order extending the time was irregular, it did not interfere with the operation of this rule. There are two answers to this; first, the order, though irregular, was not void, and could not be disregarded. It was an order to extend the time to answer; operative until vacated. And the rule is well settled that after such an order the defendant cannot demur. Second, that the defendant would gain more by having been irregular than if he had been regular. It is clear that after a regular order to extend the time, he could not demur. Ought he to have that privilege after an order that is irregular? That would be a bounty on irregularity; an actual reward for disregarding

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the rules and the practice. The order asked for must be granted.

I am sorry to be compelled to grant costs, but the defendant has placed me in such a situation that I cannot avoid it, without displaying an inexcusable disregard of the rules. I do not see that there was any necessity for the issuing of the attachment; but the manner in which the demurrer was put in gave the plaintiff an excuse for his proceedings; and as he was regular, he must have his costs.

SAME TERM. *Before the same Justice.*

WHITE & SHEFFIELD vs. THE SPRINGFIELD BANK.

In order that the holder of a negotiable security which has been passed to him in fraud of the rights of others, may be protected, he must not only have taken it without notice, but he must also have parted with something of actual value on the credit or faith thereof.

Merely receiving it as security for, or in payment of, an antecedent debt, is not sufficient.

A defendant who is in contempt, is not in a situation to raise the objection that the plaintiff has an adequate remedy at law.

IN EQUITY. Motion to dissolve an injunction. The plaintiffs, merchants in New-York, had accepted for the accommodation of Howard & Lathrop, drafts to the amount of about \$2000; some of which had been taken up by the plaintiffs, and others were about falling due. In order to raise the money to take them all up, the plaintiffs drew their note for \$2000, and gave it to Howard & Lathrop, upon an agreement that they would get it discounted and remit the proceeds to the plaintiffs. Instead of doing so, Howard & Lathrop gave the note to the defendants, in exchange for a draft of theirs on the plaintiffs for the same amount; which the defendants had discounted, but which the plaintiffs had twice refused to accept. The defen-

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dants in their answer insisted that they were bona fide holders of the note, and entitled to collect it, because, though they had received it of Howard & Lathrop for a precedent debt, yet they had at the time parted with securities which they held. It seemed that Howard & Lathrop were manufacturers in the vicinity of the Springfield Bank, and in order to procure discounts at that bank, had deposited with them the notes of other persons to the amount of \$7000, as security for any discounts made previous to that time, or to be made afterwards; and they held those collaterals at the time they discounted the unaccepted draft for \$2000 on the plaintiffs. And when they received from Howard & Lathrop the plaintiffs' note for \$2000, they did not part with any of those collaterals, but continued to hold them, as they averred, as security for other advances; and all that they did part with was the unaccepted draft of Howard & Lathrop for \$2000, on the plaintiffs, which had no name on it.

H. Ketcham, for the defendants, insisted, 1. That this was such a parting with securities by the bank as to make them bona fide holders. 2. The plaintiffs have an adequate remedy at law.

C. Goddard & S. P. Staples, for the plaintiffs, read an affidavit stating that in violation of the injunction, the defendants had brought a suit against the plaintiffs on the note; and insisted that being thus in contempt, the defendants had no right to make this motion.

- > EDMONDS, J. The rule is too well settled in this state, to warrant any discussion, that the holder of a negotiable security, which has been passed to him in fraud of the rights of others, in order that he may be protected, must not only have taken it without notice, but must also have parted with something of actual value on the credit or faith thereof, and that merely receiving it in security or payment of an antecedent debt is not sufficient.
- > In this case, the defendants have parted with nothing but

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an unaccepted draft; and their doing so has in no respect changed the situation of the parties. Howard & Lathrop are just as much liable to the bank now as ever they were, for the money they received on the discount of that draft. And the note of the plaintiffs was in fact received by them either in security for, or in payment of, this precedent debt.

It is true that they pretend, in their answer, to have relinquished their securities. But aside from the disingenuousness of that paper, which is too palpable to deceive the most ordinary understanding, the facts stated in it show the utter falsity of the pretence.

There is much more force in the objection that the plaintiffs have an adequate remedy at law. If this case was before me on an application for an injunction, before filing the bill, I am inclined to think I should for that reason refuse to allow it. But as this court has already got possession of the case, and it has progressed nearly to a close, and as this is one of a class of cases where the jurisdiction in equity is concurrent with that at law, I do not think it discreet to turn the parties round to their legal remedy; more especially when the objection comes from those who are in contempt for having violated the process of the court, whose aid they are now asking.

Motion denied, with costs.

SAME TERM. *Before the same Justice.*

BROWN vs. ANDREWS and others.

achments against parties to the suit, and the affidavits on which they are grounded, and the subsequent proceedings, should be entitled in the cause.

The death of one of several defendants is an abatement of the suit as to himself alone. And pending an abatement by the death of one defendant even process of contempt may be executed against the other.

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The interrogatories upon which a defendant is examined, on a commission of rebellion, should be confined to the fact of the service of the order or process, and to the acts constituting the violation thereof. They should not relate to any previous proceeding.

IN EQUITY. After an attachment, an alias and pluries attachment, and an attachment with proclamations, the defendant Andrews was arrested and brought into court on a commission of rebellion, for a contempt in refusing to appear and submit to an examination before a master on a creditor's bill. On being brought into court and asking time to answer the interrogatories, he was committed to prison, in default of bail in \$3000. On the day appointed, the defendant moved to set aside the commission of rebellion on the ground that the first attachment, the affidavit on which it was grounded, and all subsequent proceedings, were entitled in the original cause.

EDMONDS, J. That is no objection. Attachments against parties to the suit, and the papers therein, ought to be so entitled.

The defendant then objected that his co-defendant Wiswall had died before the defendant was arrested; and that the suit had not been revived.

EDMONDS, J. The death of a defendant is an abatement as to himself alone; and pending an abatement by his death, even process of contempt may be executed against the other defendant.

The defendant then demurred to several of the interrogatories because they related to other alleged contempts in the cause than that for which he had been arrested.

EDMONDS, J. The demurrers must be allowed. The interrogatories should be confined to the fact of the service of the order or process and to the acts of neglect or commission constituting the violation thereof. They should not relate to any previous proceeding.

SAME TERM. Before the same Justice.

WILLIAMSON vs. MORE.

The practice of moving to suppress depositions, previous to the hearing, does not prevail in this court.

Depositions can only be suppressed at the hearing.

IN EQUITY. Motion to suppress depositions taken before an examiner, under the 85th rule of the late court of chancery ; on the ground of irrelevancy and immateriality.

D. S. Jones, for the motion.

D. D. Field, contra.

EDMONDS, J. The old rules of the court of chancery do not apply to this court. The practice of applying to suppress depositions, on a special motion, was founded upon the rule on that subject, and was not a part of the general practice of the court of chancery ; and as the rule has been abrogated, no such practice now exists. The proper course to pursue will be to move, on the hearing, to suppress the depositions.

Motion denied.

SAME TERM. Before the same Justice.

HART vs. OATMAN.

The section of the judiciary act which requires the venue to be laid in a county where some of the parties reside, means parties in interest, and not the nominal parties, or parties to the record.

MOTION to change the venue from New-York to Monroe ; on the ground, among others, that neither of the parties to this

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suit are residents of the city of New-York, but that one of them resides in Seneca county and the other in Monroe, and that the suit was commenced after the first Monday of July, 1847.

The motion was opposed on an affidavit stating that Ernest Fiedler of New-York was the real plaintiff in interest, that the declaration was served on the 16th of August, that a circuit was appointed for the first Monday of October, at which the cause could be tried, and that the plaintiff would lose a trial if the motion should be granted.

W. Watson, for the plaintiff.

G. H. Stryker, for the defendant.

EDMONDS, J. On the principle established by the court of errors, in *Henry v. Bank of Salina*, (5 Hill, 523,) the plaintiff in interest in the suit is intended by the statute; rather than the party to the record. And as by granting the motion the plaintiff would lose a trial, it must be denied.^(a)

(a) The section of the judiciary act under which this decision was made was repealed by the 17th section of the statute amending that act, passed Dec. 14, 1847.

GREENE GENERAL TERM, October 25, 1847. *Harris, Parker, and Watson*, Justices.

SMITH vs. WEBB and others.

Letters testamentary issued in the state of Connecticut will not sustain a suit brought by executors in the courts of this state.

But when the plaintiffs, though executors appointed in a foreign state, are also the owners of the bond and mortgage on which the bill is filed, as residuary legatees and by purchase of the interest of their co-legates, the title having thus passed by delivery, though without any written assignment, they may sue in the courts of this state.

Barbour	
1	230
123a	42
1	230
141a	68
1b	230
166a	26

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Where, immediately after a negotiation for the loan of money, the lender goes into an adjoining room, and, the borrower not being present, states to a third person the terms of the transaction, such declarations constitute no part of the *res gesta*, and are incompetent evidence for the purpose of establishing the defence of usury.

The declarations of a prior holder of a chose in action, made while he was such holder, are not admissible in evidence against a subsequent purchaser, who has acquired title by paying a valuable consideration.

They are only admissible when made by a party in interest, or by one through whom the plaintiff claims by representation.

The fact that the party who made such declarations has since died, does not render them admissible.

IN EQUITY. In this case a bill was filed in the late court of chancery for the purpose of foreclosing upon two mortgages; one executed by Alexander Webb to the plaintiffs on the 1st of April, 1840, to secure the sum of \$1650, with interest at 7 per cent; and the other executed by Webb to Stephen Smith, of New Canaan, Fairfield county, Connecticut, on the 31st of October, 1838, to secure the payment of \$2500, "with lawful interest of the state of Connecticut." The latter bond and mortgage were executed in the state of Connecticut, where the money was loaned which formed their consideration. The land covered by the mortgage was in the state of New-York. Stephen Smith was the brother of the plaintiffs, and died at his residence in Connecticut, about five years before the filing of the bill, having made a will, by which he bequeathed his property (after the payment of three legacies) to the plaintiffs and their brother, Minot Smith, as residuary legatees. By said will the plaintiffs were also appointed executors of Stephen Smith, deceased, and took out letters testamentary in the state of Connecticut. No letters have been taken out in this state. The legacies were paid, and on a division of the residue, the bond and mortgage in question were taken by the plaintiffs; who, in consideration therefor, relinquished their interest in the obligations to Minot Smith.

Hiram Lake was a subsequent purchaser of the premises covered by the mortgage to the plaintiffs. The other facts necessary to an understanding of the points decided, sufficiently appear in the opinion of the court.

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The defence of usury was interposed to both mortgages.

The cause was brought to a hearing before the Hon. Anthony L. Robertson, late assistant vice chancellor of the first circuit, who made a decree for a foreclosure of the mortgage executed to the plaintiffs, and adjudged the bond and mortgage executed to Stephen Smith to be void for usury. The costs of the respective parties to the time of entering the decree were directed to be paid by the parties respectively.

The plaintiffs appealed from so much of the decree as declared the bond and mortgage to Stephen Smith void for usury, and from the direction as to costs.

A. Thompson, for the plaintiffs.

Caleb Day, for the defendants.

By the Court, PARKER, J. The bond and mortgage in question were executed by Alexander Webb to Stephen Smith, the brother of the plaintiffs. Stephen Smith died in the state of Connecticut, having made a will by which he appointed the plaintiffs his executors, and by which he bequeathed his property, after the payment of certain legacies, by a residuary clause, to the plaintiffs and their brother, Minot Smith. The plaintiffs administered in the state of Connecticut, but have not taken out letters in this state. The legacies have been paid, and in the division of the property under the will, the bond and mortgage in question were taken by the plaintiffs; they having conveyed to Minot Smith their interest in other property bequeathed, in consideration of which the latter transferred his share in the bond and mortgage to the plaintiffs.

It is first objected by the defendants, that this suit is not sustainable, on the ground that the plaintiffs have not taken out letters testamentary in this state. This would be a fatal objection, if the plaintiffs here sought to recover in a representative capacity. (2 *Ken's Com.* 432. *Lee v. Bank of England*, 8 *Vesey*, 44. *Morrell v. Dickey*, 1 *John. Ch. Rep.* 153. *Kerr v. Moon*, 9 *Wheat. Rep.* 565.) But this suit is not brought by

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the plaintiffs as executors of Stephen Smith, deceased, but as absolute owners of the bond and mortgage. To the extent of one-third of their interest, the plaintiffs are in fact purchasers for a valuable consideration, from Minot Smith, their co-legatee. The title passed by the delivery to the plaintiffs, who in this court are fully authorized to bring the suit in their own names, without a formal written assignment. We concur, therefore, on this point, with the learned assistant vice chancellor, in believing that no letters testamentary need be taken out in this state, to enable the plaintiffs to maintain this suit.

The next and principal ground of defence is, that the bond and mortgage are void for usury. The evidence to sustain this defence is confined to the declarations of Stephen Smith, deceased, as proved by the testimony of Hannah Maria Klaffer. It is important, therefore, to examine first, whether these declarations are admissible evidence against the plaintiffs in this suit. The assistant vice chancellor was mistaken in holding that these declarations were a part of the *res gestæ*. They were not declarations accompanying the act in question, nor statements constituting part of the negotiation. They were no part of the transaction itself; nor do they characterize or explain it. (1 *Phil. Ev.* 231. 1 *Cowen & Hill's Notes*, 585.) Here the witness testifies that after the bargain was concluded, and on the evening of the same day, Stephen Smith related to the witness what he had done. It is like the case of *Bruce v. Lusk*, (4 *Yerger*, 210,) where the holder of a check went into a bank, and when he came out said he had demanded payment. This declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. It is claimed, however, on the part of the defendant, that the declarations and admissions of Stephen Smith, made while he was holder of the bond and mortgage, are competent evidence against the plaintiffs in this suit, because they derive title through him.

The various and somewhat conflicting decisions bearing upon this point, have been recently and fully reviewed by Senator Lott, in the late court for the correction of errors, in *Paige v. Cagwin*, (7 *Hill*, 361,) and the rule established by the decision

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in that case was in accordance with previous adjudications of the late supreme court of this state. It was there held that the declarations of a prior holder of a note, or vendor of a chattel, are not admissible in evidence against a subsequent purchaser, who acquired title for a valuable consideration, and that such declarations are only admissible, where made by a party really in interest, or by one through whom the plaintiff claimed by representation. The rule is only applicable when there is an "identity of interest" between the assignor and assignee. This "identity of interest" is said, in *Fitch v. Chapman*, (10 Conn. Rep. 8,) to exist "when the nominal party was suing in fact for the benefit of a third person." Hence it is said such admissions are not evidence against a purchaser for a valuable consideration, or where there is a bona fide transfer by which the whole title passed to the assignee. This is undoubtedly the safe and correct rule. It had been previously recognized in this state to the full extent, in *Hurd v. West*, (7 Cowen, 752,) and *Beach v. Wise*, (1 Wend. 612.)

We think there can be no doubt but the application to this case, of the rule thus settled, excludes the evidence in question. The plaintiffs do not sue as executors, nor do they claim to recover in a representative capacity. They obtained one third of their interest by purchase from Minot Smith, and paid for it a valuable consideration; and as to the remaining two thirds, they are exclusively the owners. It is unnecessary to decide whether this evidence would have been competent, if the plaintiffs had obtained their whole title to the property by gift or devise from Stephen Smith. The fact proved by Minot Smith, that the plaintiffs assigned to him their interest in other obligations in payment for his share of the bond and mortgage, relieves this question from difficulty. The plaintiffs being purchasers in good faith, and for a valuable consideration, cannot be subjected to loss by the previously made admissions of a third person having no interest in the suit. It makes no difference that Stephen Smith is now dead. The case of *Beach v. Wise* above cited, and also *Stark v. Boswell*, (6 Hill, 405,) are decisive on this point.

Esterly v. Cole.

We come to the conclusion, therefore, that the declarations of Stephen Smith were not competent testimony, and that they should have been excluded. The fact that the bond and mortgage bore date about a month before the loan was made, would not of itself, and unexplained, make the transaction usurious. (*Marvin v. Feeter*, 8 *Wend.* 533. *Archbold v. Thomas*, 3 *Cowen*, 290.) There being no evidence of a corrupt agreement between the parties, the defence of usury entirely fails.

The view we have taken of this cause on the merits, renders it unnecessary for us to inquire whether the transaction in question would be governed by the laws of this state, or by those of Connecticut; whether the allegations in the answer were sufficient to admit the defence; or whether they correspond with the facts proved.

That part of the decree of the assistant vice chancellor appealed from must, therefore, be reversed, and the plaintiff must take the usual decree on foreclosure, with costs of the original suit, and of the appeal, to be taxed.

SAME TERM. *Before the same Justices.*

ESTERLY vs. COLE.

Interest is not recoverable on a running or unliquidated account, unless there is an agreement, either express or implied, to pay interest.

Such an agreement will be implied, when it appears it was the uniform custom of the merchant or manufacturer giving the credit, to charge interest after a certain time, and that such custom was known to the dealer.

Dealers are not presumed to know such customs: the knowledge must be established either by positive evidence, or by circumstances from which it may be inferred. The syllabus of the reporter to the case of *Reab v. McAlister*, (4 *Wend.* 483,) corrected.

Where there is evidence on both sides upon a question of fact, the verdict of a jury, or report of referees, will not be set aside on the ground that it is against the weight of evidence.

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THIS was a motion in behalf of the defendant to set aside a report of referees, on the ground that interest had been improperly allowed on the plaintiffs' account. The plaintiffs were merchants, doing business under the name of M. Esterly & Co., at the town of Plattekill, in the county of Ulster; and the store-house occupied by them belonged to the defendant, who had been a regular customer, at the store of the plaintiffs, from January 1, 1837, till the 1st of May, 1840. The amount of the plaintiffs' account, exclusive of credits, was \$1669,92, and the credits to the defendant, were \$982. The plaintiffs claimed they were entitled to charge interest after six months on the articles sold by them and included in the account. This claim was resisted by the defendant, but allowed by the referees; who made a report in favor of the plaintiffs for \$1144,03.

John Cole, the defendant, in person.

M. Schoonmaker, for the plaintiffs.

By the Court, PARKER, J. The rule is well settled that interest is not recoverable on running or unliquidated accounts, unless there is an agreement, either express or implied, to pay interest. (*Newall v. Griswold*, 6 *John. Ch. Rep.* 45. *Trotter v. Grant*, 2 *Wend.* 413. *Wood v. Hickock*, 2 *Id.* 501.) If it appears that it was the uniform practice of the merchant to charge interest after a certain time, and that such practice was known to the debtor, an agreement to pay interest in accordance with it is implied. (*Reab v. McAlister*, 8 *Wend.* 109.) In the report of that case in the supreme court, (4 *Wend.* 483,) the reporter has stated the decision in the syllabus as follows: "A merchant or manufacturer whose uniform custom it is to charge interest, after ninety days, upon articles sold or manufactured by him, is allowed to charge interest accordingly to those who are in the habit of dealing with him, they being presumed to know such custom, and to act in reference thereto."

The language of Justice Marcy does not warrant the statement of such a rule; nor can it, thus broadly stated, be main-

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tained, by authority, or on principle. The dealers are not presumed to know the existence of such a custom. Whether the custom is known to the dealer, is a question of fact, depending either on positive evidence, or on circumstances from which knowledge may be inferred. The existence of such a custom, therefore, and the dealer's knowledge of it, are facts to be decided by the jury, or, as in this case, by the referees.

In the case now before us, witnesses were examined on both sides on each of these points. On the part of the plaintiffs, there was evidence to show it was their uniform custom to charge interest on such accounts, after six months. Van Orden, one of the witnesses called by the defendant to disprove such a custom, stated that his account never stood six months without settlement. Stewart testified that the balance which stood against him over six months, and on which the plaintiffs did not charge interest, was only four or five dollars. Gregory testified that he had kept about even with the plaintiffs, and there was not much difference in the accounts. Fowler said, that though when he was dealing with the plaintiffs, he was ignorant that they had a custom of charging interest, yet when he came to settle his account, he found it included—"a heavy bill for interest." The referees probably considered the omission to charge interest on the balance of four or five dollars an exception to their general custom, made on account of the smallness of the sum, and regarded the evidence of Fowler as tending to sustain the alleged custom of the plaintiffs, by showing that they charged him interest.

It was conceded that eight more witnesses would have testified to the same effect as Gregory and Fowler; but such testimony would have added little if any thing to the strength of the defence, and the referees must have come to the conclusion that the custom of the plaintiffs to charge interest was satisfactorily proved.

There were also circumstances proved tending to show that the defendant knew of the existence of this custom. He had settled with Ostrander, who kept the store next before the

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plaintiffs, and to whose business the plaintiffs succeeded, and had paid him interest after six months, on a similar account.

There was also evidence to shew that it was the general custom of the merchants in that neighborhood to charge interest after six months; and we think this testimony competent, as tending to establish the defendant's knowledge of this custom. The plaintiffs were the tenants of the defendant in the occupation of the store, and the defendant was a member of the legal profession residing in the vicinity. The referees were much more competent than we are to judge from all these circumstances whether the custom, as alleged to exist, was known to the defendant.

The referees have found against the defendant on both these questions of fact, and such finding is as conclusive upon this court as the verdict of a jury. (*Eaton v. Benton*, 2 Hill, 576.) The evidence was conflicting; and there is no such decided preponderance of proof in favor of the defendant as will justify the setting aside of the report. (*Keeler v. Fireman's Insurance Company*, 3 Hill, 250. *Douglass v. Tousey*, 2 Wend. 352.)

The motion to set aside the report of the referees must therefore be denied.

TOMPKINS SPECIAL TERM, November, 1847. *Shankland*,
Justice.

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WEAVER and others vs. TOOGOOD and others.

Where the property of a defendant, sold under execution, is bid in by the plaintiff in the judgment, for a sum sufficient to satisfy the same, the plaintiff ceases to be a judgment creditor of the defendant; and he cannot attack conveyances subsequently made by the judgment debtor, nor ask to have dealings between him and third persons set aside, on the ground of fraud.

Where a judgment creditor purchases, at a sheriff's sale under an execution issued upon his judgment, land of the defendant which is covered by a prior mortgage, with knowledge of such mortgage, he cannot come into a court of equity to com-

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pel the judgment debtor to pay such prior mortgage, so as to discharge the land purchased, from the lien thereof.

In such a case the purchaser will be presumed to have bid no more than the equity of redemption was worth; and the land itself, as between such purchaser and the mortgagor, becomes the primary fund for the payment of the mortgage debt.

If the holder of a mortgage which is a lien upon a part of the real estate of the mortgagor, only, recovers a judgment upon the bond given therewith, and attempts to collect the same out of land which the mortgagor has conveyed to another, the grantee of such land may come into a court of equity for the protection of his rights, and to compel the mortgagee to resort to the mortgaged premises, for the satisfaction of his debt.

IN EQUITY. The facts in this case were as follows: Chapman Fulkerson, one of the defendants, being seised of several pieces of land in Tompkins county, mortgaged one of them to one Lamont in 1834, and another piece, of 63 acres, to Burr in 1829. Burr obtained judgment on his bond accompanying his mortgage, on the 21st of January, 1843; and soon afterwards he assigned his judgment and the mortgage to the defendant Toogood. On the 26th of January, 1843, Chapman Fulkerson conveyed away his land, not covered by the Burr mortgage, to his son Stephen Fulkerson, one of the defendants, by warranty deed. Amongst the pieces thus conveyed was a lot of 47 acres, on which the Burr judgment was a lien. The complainants obtained judgments against Chapman Fulkerson, on the 31st day of January, 1843, which were liens on the land covered by the Burr mortgage. On the 25th day of January, 1845, execution was issued on the Burr judgment, with the proper directions to the sheriff endorsed, not to sell the equity of redemption of C. Fulkerson, in the lands covered by the mortgage; and that execution was levied on the 47 acres, and other lands, and the same were advertised for sale. The 47 acres were not sold, however; but by the direction of Toogood, who had purchased the judgment of Burr, the sheriff, on the 20th of December, 1845, returned the execution unsatisfied. On the 23d of July, 1845, the complainants caused the 63 acres of land covered by the Burr mortgage to be sold on their executions, and they bid in the same, themselves, at a price which satisfied their executions. After the complainants had thus bid in the 63 acres

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covered by the Burr mortgage, Toogood caused the sheriff to return the execution issued on the Burr judgment as aforesaid, and commenced foreclosing the Burr mortgage which had been assigned to him, and which covered the 63 acres bid in by the complainants on their execution. The complainants filed their bill against Chapman Fulkerson, Stephen Fulkerson, and Toogood, to set aside the sheriff's return on the Burr execution, and to oblige Toogood to exhaust his remedy on the Burr judgment against the 47 acres sold by C. Fulkerson to S. Fulkerson, and also to set aside the conveyance from C. Fulkerson to his son S. Fulkerson, for fraud ; and for general relief. Chapman Fulkerson became insolvent in the fall of 1842, or winter of 1843 ; so that the complainants' only means of obtaining their pay was the land which they had thus purchased at the sheriff's sale on their executions.

Moses R. Wright & Ben Johnson, for the complainants.

S. Mack & A. Dana, for the defendants.

SHANKLAND, J. Admitting that the assignment made by Henry B. Weaver to Ezra Weaver, after the filing of the bill in this cause, conveyed to the latter all the right of the former in the subject matter of this suit ; and that Ezra is now the proper party to prosecute the same, it appears to me there are insuperable difficulties in the way of a decree in favor of the complainants. The complainants purchased in the 63 acres covered by the mortgage to Burr, on the sheriff's sale, by virtue of their several executions, on the 3d of July, 1845, at an amount sufficient to satisfy all those executions, leaving a surplus to go to the judgment debtor. The complainants then ceased to be the judgment creditors of Chapman Fulkerson, and became the purchasers of the equity of redemption of the sixty-three acres. (*Jackson v. Cadwell*, 1 *Cowen's Rep.* 622. *Forsyth v. Clark*, 3 *Wend.* 637, 655.)

Several important, and in this case decisive results flow from the above position. 1. The complainants cannot attack the

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conveyances to Stephen Fulkerson, nor the mortgage taken back, nor any of the dealings between Chapman Fulkerson and Toogood, on the allegations of fraud. (3 *Wend.* 637.) 2. Nor can the complainants call upon Chapman Fulkerson to pay the mortgage to Burr, or his assignee; because by the purchase they made, with knowledge of the prior mortgage, they are supposed to have bid no more than the equity of redemption was worth; and the land itself, as between the complainants and Chapman Fulkerson, became the primary fund for the payment of the mortgage debt. (*Heyer v. Pruyn*, 7 *Paige*, 465. *McKinstry v. Curtis*, 10 *Id.* 503. *Tice v. Annin*, 2 *John. Ch. Rep.* 125.) But if Toogood were forced to collect the Burr judgment out of the lands sold to Stephen Fulkerson by Chapman Fulkerson, it would deprive Chapman Fulkerson, *indirectly*, of the benefit of this principle; because he having conveyed the forty-seven acres to Stephen, with covenants of warranty, would be liable to respond to him for any failure of title, thus warranted.

But admitting that the complainants were judgment creditors, and that Toogood had liens on two funds, for the security of the same debt, viz. the mortgage on the sixty-three acres, and the judgment on the forty-seven acres, and that the complainants could reach but one of those funds, viz. the sixty-three acres; still, as Stephen Fulkerson purchased the forty-seven acres before the complainants obtained their judgments and made their purchase of the sixty-three acres, it would be contrary to equity, to deprive Stephen of the benefit of his prior purchase, for the sake of subsequent purchasers. The true rule as applicable to persons thus situated is, *prior est tempore, potior est jure*. If Stephen Fulkerson were not a bona fide purchaser, I admit this rule would not apply; and in that case I should feel no difficulty in setting aside the return of the deputy sheriff, of *nulla bona*, on the Burr execution, as false, or in enjoining Toogood against foreclosing the mortgage until he had exhausted his remedy on his judgment. But I am not prepared to adjudge that conveyance void for fraud, on the evidence submitted to me. The testimony shows, that he labored for

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his father faithfully, as a hired servant, for over six years, and that his wages, together with what he has paid and assumed to pay to the creditors of his father, amounts to the purchase money of the lands conveyed to him.

But this cause, in my judgment, stops short of that inquiry. The Burr mortgage being a valid lien, and being known to the complainants, at the time of their purchase, their subsequent judgments were liens on Chapman Fulkerson's equity of redemption only; and their interest derived from the sale on the executions issued on those judgments, cannot now be claimed to be of a more extensive title. It is very probable that the complainants thought they were purchasing the fee, and they may have bid a price accordingly; and if they were induced to do so by misrepresentation, or mistake, the court out of which their execution issued may relieve them, on a proper representation of the facts. Indeed a bare statement of the facts, as they existed at the date of the complainants' purchase, will show how easily they could have been mistaken, as to the value of their purchase. Burr, at that time, had a judgment for the mortgage debt, which was a lien on the forty-seven acre lot, but which was not a lien on the sixty-three acre lot covered by the mortgage. The execution on that judgment was in the hands of the sheriff, with directions to levy; and the forty-seven acres were subject to that levy. Such were the circumstances existing on the 3d of July, 1845, when the complainants became the purchasers of the sixty-three acres, at the sale on their executions. And it is only by reason of the false return of the sheriff, subsequently made on the Burr judgment, that the mortgage given to Burr, and by him assigned to Toogood, can be foreclosed on the sixty-three acres. (2 R. S. 119, § 162. *Id.* 450, § 2. *Id.* 291, § 31.)

But although the complainants could not foresee that the deputy sheriff would make such a return as would enable the owner of the Burr judgment to reach the land purchased by them, through a foreclosure of the mortgage, yet they were bound to know that Stephen Fulkerson, as a prior purchaser of the forty-seven acres, could come into a court of equity and

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oblige the owner of the Burr mortgage and judgment, to sell the lands which had belonged to Chapman Fulkerson, in the inverse order of their alienation. (*Clowes v. Dickenson*, 9 *Cowen's Rep.* 403. *Gill v. Lyon*, 1 *John. Ch. Rep.* 447. *Clowes v. Dickenson*, 5 *Id.* 235.) They were also bound to know that as between themselves and Chapman Fulkerson, they obtained only his equity of redemption by their purchase; and that the land was the primary fund for the payment of the mortgage debt. And that if the owner of the Burr debt should attempt to collect it out of the mortgagor's other property, or out of property which he had conveyed with warranty, he could call upon this court to protect his rights, and oblige a resort to the mortgaged premises for the satisfaction of that debt. (*Jumel v. Jumel*, 7 *Paige's Rep.* 591. *Heyer v. Pruyn*, *Id.* 465. *Cox v. Wheeler*, *Id.* 248.)

The result of the above principles, which are adopted and sustained by this court, is that the false return of the deputy sheriff, on the execution issued on the judgment in favor of Burr, against Chapman Fulkerson, has worked no injury to the complainants, inasmuch as this court, on the application of either of the Fulkersons, would have compelled a resort to the mortgaged premises for the satisfaction of the Burr debt, if the sheriff had attempted to sell the forty-seven acres purchased by Stephen Fulkerson.

Although I do exceedingly regret the necessity which obliges me to come to the above conclusions, I must dismiss the complainants bill, with costs; but without prejudice to their rights in any future litigation.

NEW-YORK SPECIAL TERM, November, 1847. *Edmonds,*
Justice.

HARRINGTON *vs.* THE AMERICAN LIFE INSURANCE AND
TRUST COMPANY.

It is irregular for the plaintiff to file an injunction bond, unless its execution has been duly proved or acknowledged.

After the court of chancery has dissolved an injunction issued upon a bill filed in that court, it is irregular for the plaintiff to dismiss his bill, and on a new bill, substantially the same as the former, filed in this court, apply to a judge thereof, at chambers, for a new injunction.

If there are grounds to justify the issuing of a new injunction upon the second bill, in such a case, the plaintiff should apply to this court for a temporary injunction, and for an order that the defendant show cause why it should not be continued till the hearing.

IN EQUITY. The plaintiff filed his bill in the late court of chancery, before the vice chancellor of the eighth circuit, to set aside two mortgages, as void on the ground of usury, and because given in violation of our restraining law. And he obtained an injunction, *ex parte*, to stay a statute foreclosure of them. It appeared that the premises were worth \$110,000, and the amount due on the mortgages, for principal and interest, was \$103,000; that the plaintiff was in possession or enjoying the rents and profits of the mortgaged premises, and that he had omitted for several years to pay any interest on the mortgages.

On this state of things the vice chancellor, on a motion to dissolve the injunction, ordered that it should be dissolved unless the plaintiff, within thirty days, gave the usual injunction bond, in the penalty of \$40,000, with sufficient sureties. This was in June, 1847, shortly before the new constitution went into effect. The plaintiff did not give the bond required, but after the first Monday of July, discontinued that suit and filed a new bill in this court, seeking the same relief, and containing substantially the same averments. On an *ex parte* application to one of the judges of this court, he obtained the

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allowance of an injunction in this court, on filing his own bond in the penalty of \$500; without disclosing to the judge the prior proceedings.

D. Lord, Jun. for the defendants, now moved to dissolve the injunction, for irregularity. 1. Because the execution of the bond had not been proved or acknowledged. 2. Because the second injunction was in violation of the statute, prohibiting a second injunction, in certain cases, after the denial of a former one.

E. Norton, for the plaintiff.

EDMONDS, J. There are two reasons why the injunction in this suit should be dissolved.

One is, that the execution of the injunction bond was not proved or acknowledged. On that alone, I might not dissolve the injunction, if the plaintiff should remedy the defect; because the bond was given at a time, (17th July last,) when it was unknown and uncertain what the rules of the court were, or would be, in this respect. But the other reason is one growing out of the statute; which the court has no right to disregard. (2 R. S. 173, § 32.) The court of chancery, in *Cummings v. Bennett*, (8 Paige, 79,) gave a construction to this statute, wise in itself and authoritative with this court. The statute having prohibited a second ex parte application to an officer out of court, after the chancellor or vice chancellor having jurisdiction has refused an injunction, it would be a palpable evasion of the spirit and intention of this statutory provision to permit such an ex parte application on a new bill. Much more would it be an evasion, if after the court of chancery had, upon argument, dissolved the injunction, the plaintiff should dismiss his bill, and on a new one substantially the same, apply to another officer, ex parte, for a new injunction.

In this case, as in that in 8 Paige, if the plaintiff had any grounds to justify the issuing a new writ, upon a new bill, he should have applied to the court; and then if the necessity of

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the case justified it, the court might have granted a temporary injunction, and an order to show cause why it should not be continued, so that both parties might be heard.

The new bill filed in this case, is, so far as the injunction is concerned, substantially the same as the former bill. The new averments added, do not materially affect that question. On the former bill, the court of chancery, after hearing both parties, dissolved the injunction. For a judge, *ex parte*, on such new bill now to allow an injunction, would be virtually reversing the decision of that court; and that no judge would take it upon himself to do. Nor is it probable that the former proceedings of that court were disclosed to the judge who allowed this injunction; for if they had been, it is not at all likely that an injunction would have been granted; at least, in such a manner as this, virtually out of court, and on an *ex parte* application, to reverse the decision of the court of chancery.

The obtaining the injunction then, in this case, was like the case in *8 Paige*, an evasion of the statute; and the writ must be set aside as irregular. But the amount in controversy is large, the questions involved are of a grave character, which the plaintiff is well justified in presenting to the court; the injury which he has already sustained, if the mortgages should be enforced, are considerable, and the consequences of an immediate dissolution of the injunction might be very disastrous. On the other hand, the plaintiff is in possession of the mortgaged premises, and no interest has been paid for several years on the mortgages; by means whereof the amount claimed to be due on them has swelled up from \$65,000 to about \$103,000, nearly the value of the premises. And while the litigation is going on, the mortgagor is receiving the rents and profits, and the amount of the mortgages may, before it terminates, exceed the value. It may, therefore, be proper to allow an injunction restraining the statute foreclosure of the mortgages, until the termination of this suit, upon a proper bond protecting the holders of the mortgages against the hazard of loss from this cause. The case, however, is not now before me so that I can determine that question. The plaintiff may desire to bring it

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before the court, and the nature of the questions involved forbids that he should be deprived of the opportunity.

The order that will be entered will, therefore, be that the injunction be dissolved at the expiration of thirty days from the service of the order, with leave to the plaintiff to move the court on a proper case, for an injunction, &c. The plaintiff to pay the costs of this motion, to be taxed.

SAME TERM. Before the same Justice.

BROOKS vs. McLELLAN.

Where a judge's order is necessary for holding the defendant to bail in actions of tort, something more must be stated in the affidavit than merely a cause of action. Some special cause must be shown, in addition.

A resident of the state will not be held to bail, unless evidence is produced to justify the apprehension that he will not be within the jurisdiction of the court, to answer the plaintiff's demand, when judgment shall be obtained against him.

THIS was a special action on the case for deceit. The defendant was held to bail on a judge's order, and a motion was now made by him to vacate the order.

R. H. Waller, for the plaintiff.

Mr. Norris, for the defendant.

EDMONDS, J. The rule for holding to bail in actions of tort is, that in all cases where a judge's order is necessary, something more must be stated in the affidavit than merely a cause of action. Some special cause must be shown in addition, such as, that the defendant is a non-resident, or that he is about to depart out of the state, and the like. A resident of the state cannot, in such cases, be held to bail, unless evidence is pro-

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duced to justify the apprehension that he will not be within the jurisdiction of the court to answer the demand, when judgment shall be obtained against him.

Order discharged.

SAME TERM. *Before the same Justice.*

In the matter of NICHOLAS LUCIEN METZGER.

The president of the United States has no authority, by virtue of mere treaty stipulation, and without an express enactment of the national legislature, to deliver up a resident of this country to a foreign power.

Upon the principles of the common law, a treaty does not execute itself; nor can the courts act under it, for the purpose of enforcing its provisions, except in pursuance of a statute.

The provision in the constitution of the United States which declares that the constitution, and the laws made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, does not, *ex proprio vigore*, and without legislative enactment, confer upon the officers of the national government the power of executing the stipulations of a treaty.

Where a treaty contains a provision importing a contract that its terms shall, at some future period, be ratified and confirmed, such treaty does not execute itself; but it must be executed by an act of congress, before it can become a rule for the decision of the courts.

Where the treaty is a contract to be performed *in futuro*, the courts have no power, except under the statute; and if the provisions of the statute are not clearly complied with, they have no power at all, in the matter.

The treaty of 1843, between the United States and France, cannot, in any sense, be held to execute itself. It was not intended to act *in presenti*. It was a contract between the two nations to be executed only *in futuro*; and it stipulated for future legislation. Without such legislation the courts have no power to act, in executing the treaty.

Although that treaty may be regarded as executing itself, so far as to establish the right of the French government to the surrender of a criminal, legislation is required to enforce the delivery, and secure the subsequent possession, of the fugitive.

And the want of such legislative sanction is not mere matter of form. It is a substantial right; and involves too deeply the liberty of the citizen to be dispensed with. In cases of this nature state magistrates have no original authority.

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Nor has a district judge of the United States, at chambers, any power to aid in carrying a treaty into effect; in the absence of any provision of the constitution, of the treaty, or of the statute, conferring the power upon officers of that description.

The mandate of the president of the United States commanding the marshal to surrender a prisoner to the diplomatic agents of a foreign government, under the provisions of a treaty, is not conclusive. Upon a writ of *habeas corpus*, the legality of the foundation on which such mandate rests may be inquired into.

Where a treaty was drawn up in the French as well as in the English language, and both parts were originals, and were intended by the parties to be identical, but the French counterpart varied from the English in certain particulars; *Held*, that if both parts could without violence be made to agree, that construction ought to prevail which would establish a conformity between the two parts.

A prisoner who has been merely charged, or accused, before a magistrate in France authorized to arrest, is not a party accused—*mis en accusation*—within the meaning of the treaty of 1843 between the United States and France. And he cannot be demanded by the French government, nor surrendered by the American, by the terms of that treaty.

The president cannot execute the power of extradition, under that treaty, without both legislative and judicial sanction, previously obtained.

THE prisoner was a notary public in one of the departments of France, which country he left and came to this state. After he had left his residence, it was charged against him that he was a defaulter to his clients to a large amount, for moneys of theirs which he had embezzled, which embezzlement he had attempted to conceal by means of forgeries. Complaint to that effect was made against him, before a French committing magistrate, who issued a warrant for his arrest. He was not, however, apprehended on the warrant, but the papers, duly authenticated, were transmitted to this country, and the French minister demanded his surrender under the treaty with France of 1843. That functionary was referred by the secretary of state to the courts or magistrates of the country, and he accordingly made application to one of the police magistrates of New-York for a warrant, on which Metzger was arrested. An examination was had before that officer, who adjudicated that the prisoner was within the treaty, and issued his warrant committing him to prison until the president of the United States should demand him. Before that demand was made, the prisoner was taken before the circuit judge of the first circuit, on *habeas corpus*. That officer decided that the police magistrate had no

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jurisdiction in the matter, and that the prisoner was entitled to be discharged from that commitment. The French diplomatic agent then made application to the United States district judge, before whom similar proceedings were had ; which resulted in a similar adjudication, and a like warrant of commitment. Application was then made to the supreme court of the United States for a writ of habeas corpus to review the action of the district judge. The application was denied, on the ground that that court had no power to review the action of a district judge at chambers.

Thereupon the president of the United States issued his mandate to the marshal of New-York, commanding him to surrender the prisoner to the diplomatic agents of the French government. Before, however, the surrender was actually made, a writ of habeas corpus issued, directed to the marshal, returnable before Edmonds, Circuit Judge. The matter was twice argued before him, and under the judiciary act of 1847 was transferred from him as circuit judge to him as judge of the supreme court under the new constitution.

N. B. Blunt & Ogden Hoffman, for the prisoner, demanded his discharge for the following reasons. 1. That the crime alleged was committed between the signing of the treaty and its ratification, and was not therefore within its operation. 2. That the prisoner had been only charged with the offence, and not indicted ; that he was *inculpè* and not *accusè*, and therefore not within the treaty. 3. That the president of the United States had no authority to act in the matter until congress had provided by law for the execution of the treaty. 4. That the federal judiciary had no power to arrest, examine, or commit, except under a statute ; and as no statute had been passed, there were no means provided by government for executing the treaty. 5. That the act charged is not a crime under our laws, and therefore not within the treaty. 6. That the president's mandate is not conclusive, but its foundation may be inquired into, and be impeached.

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B. F. Butler, (U. S. district attorney,) for the United States.

I. It appears from the marshal's supplemental return, and it is conceded by the replication, that the prisoner is held in custody by virtue of the president's mandate, for his surrender to the authorities of France, as a fugitive from the justice of that country within the meaning of the convention of the 9th of November, 1843. II. The validity of this mandate is therefore the only question now to be decided, though in order to its decision, it is proper to look into the provisions of the treaty, the orders of Judge Betts contained in the return, and the evidence presented to and taken before him, and transmitted by him to the state department; for the purpose of ascertaining whether they authorize the action of the president. III. The treaty, although not previously obligatory on either of the contracting parties, became, upon the exchange of ratifications, a part of our supreme law. And by its true construction it authorizes and requires the surrender of fugitives from the justice of either party, found within the territories of the other, who at any time after the 9th of November, 1843, are duly proved to have committed any of the crimes enumerated in the treaty. This construction does not render the provision liable to objection as an *ex post facto* law, within the meaning of the prohibition of such laws in the constitution of the United States; because—

1. The prohibition referred to, if it can be extended to cases arising under *treaties*, can only apply to cases within, and persons amenable to, *the jurisdiction of the United States*.
2. The treaty neither *creates* the crime nor increases its *punishment*. If it alters the situation of the criminal, it does so only in respect to the *remedy*; and, under our constitution such laws are valid.

IV. The treaty being part of the supreme law, addressed to the judiciary as well as to the executive, Judge Betts had competent authority, upon the complaint and affidavit laid before him, to issue his warrant for the arrest of Metzger, and to inquire into and decide upon the subject matter of such complaint. This authority was duly exercised by him in the order committing Metzger to the marshal, to abide the

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order of the president; and his decision conclusively sustains that order. It is *res adjudicata*.

V. The validity of the president's mandate does not necessarily depend on the question, whether or not Judge Betts had jurisdiction; and whatever may be the true answer to that question, yet as the third article of the treaty (differing in this respect from all our prior treaties of this nature,) *expressly* provides that the surrender shall be made by the president, and as the president in this case has made an order to that effect, his mandate must be deemed lawful, and should be executed; provided it be found, on looking into the evidence, that Metzger is, within the meaning of the treaty, a fugitive from the justice of France, whose surrender is duly demanded by the government of that country. VI. It appears by the return of the marshal, and the evidence, that Metzger is such fugitive, and that his surrender is so demanded. 1. The word "*accusé*" in the French side of the treaty, is to be understood in its general sense, and as equivalent to the English word "charged," by which it is twice rendered in the English side. 2. The proofs annexed to the affidavit of Mr. Borg, are properly authenticated to be read as evidence, and by them it appears, that Metzger has been charged with, and accused of having committed, in France, since the date of the treaty, the crime of *forgery*, as defined and denounced in the French penal code. 3. It is not necessary that the forgery with which the prisoner stands charged, should also constitute the crime of *forgery* as defined in the acts of congress, or by the law of New-York. 4. The government of France, through its proper diplomatic agents, has demanded his surrender from the executive of the United States.

VII. The mandate of the President being fully warranted by the provisions of the treaty, and the facts of the case, the prisoner should be remanded to the custody of the marshal.

EDMONDS, J. This case involves the question whether the president of the United States has authority, by virtue of mere treaty stipulation, and without an express enactment of the national legislature, to deliver up to a foreign power, and virtually

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to banish from the country, an inhabitant of one of the sovereign states of our confederacy. The importance of the question has weighed heavily upon me during the whole time that the case has been before me. The right is claimed, and has been exercised, by that high functionary in this instance; its exercise is demanded by the French government in the name of the treaty between the two nations, and a branch of the federal judiciary has sanctioned it.

Amid this imposing array of power against him, the prisoner, a resident among us and entitled to the benefit of our laws, has thrown himself for protection upon state sovereignty, and demanded the interposition of its authority between him and the exercise of this extraordinary power. To that protection he has a right, in common with every inhabitant of our state, and it becomes my duty, as one of the state judiciary, to see that he sustains no injury in the exercise of this power.

The apprehension that out of the discharge of this duty there might spring a conflict between national and state authority has not been without its influence on my mind, causing me to pause long, and weigh well any decision which I might make. Presenting to my mind, as this case does, the picture of the whole power of the nation claiming and enforcing the surrender of the individual on the one hand, and personal liberty demanding protection against the exertion of extraordinary power on the other, I have not been free from anxiety as to the conclusion at which I might arrive, and the consequences which might flow from it.

The question is, in a great measure, under our institutions, anomalous; arising out of that peculiar provision of our national constitution which declares that all treaties made under the authority of the United States shall be the supreme law of the land. But for this provision, and the construction claimed for it, the question might justly be regarded as already settled by authority. The British government, in February, 1843, made a treaty with France, identical in this regard with the convention between France and the United States. The British administration and the British parliament did not deem that the con-

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vention executed itself, or that it could be executed without legislative enactment. Hence the statute 6 and 7 Vict. c. 75 was passed, which recited this clause of the convention, and declared that it was expedient that provision should be made for carrying it into effect, and then enacted that any justice of the peace, or other person, having power to commit for trial persons accused of crime, &c. might examine witnesses and issue his warrant to apprehend the alleged fugitive, and commit him to jail until delivered pursuant to the requisition. Under this statute the lord mayor of London, in September, 1844, issued his warrant for the arrest of an alleged fugitive from France, who, on being arrested, was brought before the Queen's Bench on habeas corpus. That court held the warrant void, and on being applied to for the purpose of remanding the prisoner, as a person accused under the treaty, they denied that they had any power but under the statute, and decided that if its provisions were not clearly complied with they had no power at all in the matter. (*In re Bessett*, 1 *New Sess. Cas.* 337.) Here then is a decision that, on the principles of common law, the treaty does not execute itself, and that even the highest judiciary in the nation could not act under it but in pursuance of a statute. And this exposition flows not only from the British courts, but from the British executive and the British legislature.

I know of nothing except the provisions of the constitution of the United States to which I have alluded, which can exempt our courts from the binding force of the same doctrine, when they and the English courts alike draw the principles of their action, and the rule and guide of their judgments, from the same fountain of the common law. Hence arises the necessity, in this case, of considering the meaning and force of this constitutional provision, and of inquiring how far it does, *ex proprio vigore*, and without legislative sanction, confer upon the officers of the national government the power of executing the various matters to which it relates. In the first place it must be observed that the provision in question does not relate to treaties alone. It is the constitution itself and the laws of the United States, which shall be made in pursuance thereof, and all trea-

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ties made or which shall be made under the authority of the United States, which shall be the supreme law of the land. (*Const. art. 6.*) If this provision has this self-acting power in regard to treaties, it has it equally in regard to the constitution at large; and from this consideration we may well appreciate the magnitude and interest of the question involved.

What is the meaning of the supremacy here provided for? That the power is itself omnipotent—self-acting and self-dependent alone—and that the functionary clothed with it, if perchance he be the executive, is in that regard beyond the control alike of the judicial and legislative departments of the government? Such must be the result, if that provision does give, as is claimed in the argument before me, to the constitution and to treaties this self-sufficing authority. But such, as I understand it, is not the true reading of this provision. The 22d No. of the *Federalist* defines its purpose in language more felicitous than any which I can use:

“The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.” * * * “If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts.” * * * “To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.” * * * “The treaties of the United States under the present constitution are liable to the infractions of thirteen different legislatures and as many different courts of final jurisdiction.”

Hence arose the establishment of a supreme judicatory, not that it should be omnipotent and self-sufficing in its power, but

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that, within its sphere, it should be paramount to all other judicatories. Hence, too, the provision in question, that the constitution, the laws made in pursuance of it, and the treaties, should be the supreme law; not that they should be omnipotent and self-sufficing in their authority, but that they should be paramount over all other authority, so that, if when duly executed, they should come in conflict with any other, they should be supreme and paramount. This is no novel doctrine. But as I read the history of our country, it has prevailed from the beginning, though not now for the first time questioned. In the celebrated case of Jonathan Robbins, Chief Justice Marshall, then a member of the house of representatives, asserted the same claim which is put forth for the government in this case. But he went farther and followed the doctrine out to its legitimate results, by insisting that the case was one for executive and not judicial decision, and that the judicial power cannot extend to political compacts, such as the case of the delivery of a murderer under the 27th article of Jay's treaty with Great Britain. (5 *Wheat. App.* 16.) In several instances, however, and at different periods, congress has, by its action, given a different construction to this provision of the constitution. A few instances will suffice.

The constitution, art. 3, § 2, declares that the judicial power shall extend, among other things, to all cases affecting ambassadors, other public ministers and consuls, and that in those cases, the supreme court shall have original jurisdiction. It might well be supposed, that if any power in that instrument, which is to be the supreme law of the land, could be thus self-acting; it would be the power thus explicitly conferred. Yet in the judiciary act of 1789, § 13, congress provides for the exercise of this jurisdiction both for and against ambassadors and other public ministers. So, too, the constitution, art. 4, § 2, provides that fugitives from justice shall, on demand of the executive of the state from which they have fled, be delivered up to be removed to the state having jurisdiction of the crime. This provision also of the supreme law of the land, might be supposed to execute itself, yet congress in 1793, passed a law upon

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the subject, in order to carry it into effect. The origin of this law is a striking illustration of the interpretation which prevailed at those early days. It grew out of a demand made by the governor of Pennsylvania upon the governor of Virginia for the surrender of a fugitive from justice. With that demand the executive of Virginia refused to comply, for one reason, among others, because congress had not passed any statute to execute this provision of the supreme law of the land. The opinion of the attorney general of Virginia assuming that position, and the reply of the executive of that state sanctioning it, were communicated to congress by President Washington in October, 1791, and out of that state of things flowed the statute, which has for more than half a century governed the whole action of our citizens in that regard. (*American State Papers*, vol. 20, p. 38.) If the claim now asserted is well founded now, it was so then; and if well founded, then indeed were this statute and that also which came into existence at the same time in regard to fugitives from service, works of idle supererogation on the part of congress.

So, also, the same article of the constitution provides that persons held to service or labor in one state, escaping into another, shall be delivered up on claim of the party to whom such service or labor may be due. This provision, too, of the supreme law, so far from executing itself by virtue of its supremacy, is helped out, and carried into effect, by the same law of congress, and sprung from the same necessity for legislative action which was then conceded. So, too, the article of the constitution, (*Art. 2, § 3*), which declares it to be the duty of the president to take care that the laws be faithfully executed, is helped out and carried into effect by the act of 1795, which gives him authority to call out the militia to suppress insurrection in any of the states. These are all provisions of the constitution—the supreme law of the land—which congress at an early day deemed it necessary to legislate upon, for the purpose of carrying it into effect. And it may well be asked why this necessity, if this supreme law was, by virtue of its supremacy, self-sufficing, and did execute itself without legislative interposition?

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Such has also been the action of congress and the interpretation of the national government in relation to our treaties; which are also the supreme law. In 1788, a convention was entered into between France and the United States, providing for the arrest and surrender of deserting seamen, in which it is provided that for that purpose the consuls shall address themselves to the courts, judges and officers competent, and demand said deserters in writing, &c. And all aid and assistance to the said consuls shall be given for the search, arrest and seizure of said deserters, who shall be kept and detained in the prisons of the country, &c. In 1824 a similar treaty was made with the republic of Colombia, and from that time down to 1845, various treaties with nations in Europe, Asia and America have been made containing the same provision as to deserting seamen.

Specific as is this provision in these various treaties—pointing out as it does even the manner in which the power shall be exercised—congress and our government have been so far from regarding it as capable of executing itself, that in 1829 a law was passed in language scarcely more particular than the various treaties, providing for carrying them into effect.* A marked instance of a similar character is of more recent occurrence. We have a treaty with Spain, providing against privateering, and declaring that if any person of either nation shall take a commission as privateer, or letters of marque, he shall be punished as a pirate.

Yet congress and our government did not regard this treaty, though the supreme law of the land, and distinctly defining the offence as piracy, and thus bringing it clearly within the jurisdiction of the federal courts, as sufficient to execute itself; but on the 3d of March, 1847, passed a law in the following words:

An act to provide for the punishment of piracy in certain cases.

Be it enacted, &c. That any subject or citizen of any foreign state who shall be found and taken on the sea, making war

* This act is understood to owe its origin to the fact that so distinguished a jurist as Judge Story refused to execute one of these treaties until congress had legislated on the subject.

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upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted and punished before any circuit court of the United States, for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted and punished in said court. (Approved March 3, 1847.)

So far as the supreme court of the United States have acted on this question, they seem to have adopted the same principle. In *Foster v. Neilson*, (2 *Peters*, 314,) they declare that a treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished; especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provisions. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the legislature must execute the contract before it can become a rule of court. And speaking of the particular treaty then under consideration, they add, "This seems to be the language of contract, and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject." In the *United States v. Arredondo*, (6 *Peters*, 734,) that court affirmed the same doctrine, and again speak of a treaty which is a contract between two nations, the stipulations of which must be executed by an act of congress before it can become a

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rule for their decision. These two cases involved the treaty with Spain of 1819, and they grew out of the words used in it, that certain grants "shall be ratified and confirmed." The court held that if these words imported that these titles "are hereby ratified and confirmed," then the treaty, by virtue of its, being the supreme law, operated *per se* to ratify and confirm; but if they imported a contract that they should at some future period be ratified and confirmed, then the treaty did not execute itself, but it must be executed by an act of congress before it could become a rule for the decision of the courts. In other words, where the treaty is a contract to be performed *in futuro*, the English rule as laid down by Lord Denman, in 1 *New Session Cases*, is applicable, the courts have not any power but under the statute, and if its provisions are not clearly complied with, they have no power at all in the matter. The supreme court of the United States a third time, in reference to those words, reiterate the doctrine. In the *United States v. Pescherman*, (7 *Peters*, 87,) Chief Justice Marshall says that although the words "shall be ratified and confirmed" are properly words of contract *stipulating for some future legislative act*, they are not necessarily so. They may import that they shall be ratified and confirmed by force of the instrument itself.

In the latter signification of the terms, in a country where the treaty is the supreme law of the land, it may perchance be well said that the treaty executes itself. But this provision in the convention with France under which this prisoner is held, can in no such sense be held to execute itself. It never was intended to act *in presenti*. It was a contract between the two nations to be executed only *in futuro*, and in the language of principle, of the action of congress and the decisions of the federal judiciary, it stipulated for future legislation, without which, as the Queen's Bench declares, the courts have no power at all in the matter.(a)

(a) In the case of *The British Prisoners*, (1 *Wood. & Minot's Rep.* 66,) it was decided in the circuit court of the United States for the first circuit, that under the treaty with *Great Britain* of August, 1842, persons charged with piracy, committed contrary to acts of parliament, and on board a British vessel, may be arrested here,

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In the debate in congress on the Jonathan Robbins matter, it was stated that President Washington had entertained doubts whether the extradition clause in Jay's treaty could be executed without legislative action. And in 20 *Serg. & Rawle*, 135, the supreme court of Pennsylvania express the same doubt, and declare that the opinion of the executive hitherto had been that it had no power to act. In the case of *Prigg v. Commonwealth of Pennsylvania*, (16 *Peters*, 624,) the provision of the constitution as to the surrender of fugitives from service was under consideration. Story, J. in delivering the opinion of the court, speaking of that clause which enacts that the fugitive shall be delivered up on claim of the party to whom such service may be due, says, "We think it exceedingly difficult, if not impracticable to read this language and not to feel that it contemplated some farther remedial redress than that which might be administered at the hands of the owner himself. * * *

They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession, of the slave." And the court in this case, in adjudicating upon language very similar to that contained in the treaty, declare that the constitution does execute itself, so far as to establish the absolute right of the owner to recapture his slave, but that to enforce the right the aid of legislation is required. And by parity of reasoning, while we may regard this treaty as executing itself so far as to establish the right of the French government to the surrender, legislation is required to enforce the delivery, and secure the subsequent possession, of the fugitive.

The want of this legislative sanction on which so much stress is laid, is not mere matter of form. It is a substantial right,

and surrendered without any special act of congress to carry that treaty into effect. But Mr. Justice Woodbury, who delivered the opinion of the court in that case, places the decision upon the ground that no act of congress was necessary under that treaty; the act to be done being chiefly ministerial, and the details unusually full, in the treaty. And he observes that if a treaty stipulated for some act to be done, entirely *judicial*, and not provided for by a general act of congress, it could hardly be done without the aid, or preliminary direction, of some act of congress prescribing the court to do it, and the form.

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and involves too deeply the liberty of the citizen, to be dispensed with. Treaties by our government are made by the executive, without the sanction of the legislature. The extradition provided for by this convention with France is not confined to the subjects of France. An American citizen may be demanded by the French government, and our executive may on such demand, banish a native of our soil—nay, if one, then hundreds. And it becomes us well to see that, power so great should be properly guarded.

There is another consideration flowing from this view of the case. Neither the constitution, the laws, nor the treaty, which together constitute the supreme law as to this case, provide for the interposition of the judiciary in the exercise of this power. On the other hand the treaty provides that on the part of the United States the surrender shall be made only by the authority of the executive thereof. And although the executive has, in this case, with great propriety, invoked the aid of the judiciary, yet he has done it in such manner that the decision of the subordinate tribunal appealed to, cannot be reviewed in the court of dernier resort and therefore becomes final. And if the right claimed in this case for the executive to act in the matter without legislative sanction be once firmly established, I cannot discover any provision in the supreme law which renders it necessary for him to seek the aid of the judiciary. It may be convenient for the executive to resort to the machinery of the judiciary, or the incumbent for the time being may entertain such a sense of duty as to induce such a resort; but the right once established as now claimed, it must necessarily become a matter of discretion with the executive, whether he will require the assent of either the legislative or judicial departments to his surrendering to a foreign government any person, native to the soil, or immigrant, whom it may please to demand as a fugitive from justice.

In the absence of any statutory provision, the executive can resort, for the rule of its action, only to the treaty. The treaty with France no where provides for a resort to the judiciary. It declares that persons accused of crime shall be delivered up,

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provided that this shall be done only when the fact of the commission of the crime shall be so established, as that the laws of the country would justify their apprehension and commitment for trial. How established, and before what tribunal? It is the executive alone who can surrender, and if the treaty alone is to be the guide of his action, then when he becomes satisfied that the commission of the alleged crime is established, whether that be with or without the aid of the judiciary, he can surrender. Such is the claim presented before me, and, if established, then is the liberty of the citizen, at least as respects extradition, subjected to executive discretion to an extent that is calculated to alarm even a country where freedom in the aggregate is so common that its invasion in detail is too often and too easily disregarded. To meet an objection so formidable in its character, it is urged that the aid of the judiciary must of necessity be invoked in the execution of the treaty.

I have already had occasion to decide in this case that the state magistrates have no original authority in the matter.(b.) Not having seen any reason for changing my opinion, and that opinion having been acquiesced in by all parties concerned in this matter, that must be regarded as *pro tanto* the law of this case. The remaining question then is, whether any of the federal magistrates have the authority? The question may well be put still broader, and comprehend not merely the inquiry whether the federal judiciary may entertain jurisdiction, but also whether it ought not to be the duty of the government, and the right of the prisoner to make the appeal to them. I will not stop, however, here to consider that question, but pass at once to the simple topic of the authority of the federal magistrates, voluntarily or otherwise, to act in the matter. And this topic need not be discussed any farther than to the extent

(b) In the case referred to in the preceding note, it was held that under the *British* treaty, persons charged with offences contrary to acts of parliament may be examined, and if believed guilty, be ordered into custody with a view to a future surrender. And that this may be done by a magistrate of a state; though such magistrate is not compellable to do it, by the United States.

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and as to the manner in which the authority has been exercised in this case.

It must then be observed in the outset, that the action on which the prisoner was committed, was not the action of any court, but of a district judge as such. The arrest, examination, and commitment were none of them the act of the district court, but of the judge, as such, at chambers, or as committing magistrate. It is important to keep this fact in mind, as it was one of the main grounds on which the United States supreme court refused to this prisoner his application for the writ of habeas corpus; and it brings us to the real question in this case, whether a district judge, not sitting in court, has the power to aid in carrying a treaty into effect. Marshall, in his speech in the *Robbins* case, repeatedly denied the authority of the judiciary in every form. That was the second proposition he maintained; (5 *Wheat. App.* 16;) which was that the case was a case of executive and not judicial decision. He proceeded to refute the position of Mr. Livingston, that the judicial power of the United States expressly included that under consideration. He maintained (page 77) that the judicial power cannot extend to political compacts, as the establishment of a boundary line, &c., or the case of the delivery of a murderer, under the 27th article of our present treaty with Britain; and he proceeded with this language: "The gentleman from New-York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr. Marshall, but not triumphantly, to retort the question. By what authority can any court render such a judgment? What power does a court possess to seize any individual and determine that he shall be adjudged by a foreign tribunal. Surely our courts possess no such power. Yet they must possess it, if this article of the treaty is to be executed by the courts." And he concluded with the remark, "The case was in its nature a national demand, made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance." Again, (on page

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28) he says, It is then demonstrated that according to the practice, and according to the principles, of the American government, the question whether the nation has or has not bound itself to deliver up an individual charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the executive department. The inference from that debate and its results, is as fair, perhaps, as any other, that the majority of congress who went with him on that occasion, and in the language of Judge Story, "put the question at rest and forever," intended to sustain that as well as the other principles which he then advanced. Mr. Marshall maintained that, a treaty providing for the surrender of fugitives being made, the executive was competent of itself, without judicial or legislative aid, to execute it. How far he is competent without legislative aid, has already been shown from authority, upon principle and by the action of the government for 50 years. And the United States supreme court, in the case of *Holmes v. Jenison*, (14 *Peters*, 540,) and more recently on the application of Metzger for a habeas corpus, have recognized the necessity of judicial action.

But then the questions recur, whence do the judiciary derive their authority to act in the matter? Who is to set them in motion, and what is to regulate and control the form and manner of their going? And how are the rights of the accused to be protected? These are important questions under our state constitution, which declares that no man shall be deprived of any of the rights or privileges secured to him, unless by the law of the land, or the judgment of his peers.

The learned judge, upon whose warrant the prisoner was committed, evidently has strong doubts upon this subject, though he thinks them capable of a satisfactory solution. But the solution which he discovers is applicable only to courts of the United States, not to the judges acting out of court; and he seems to have overlooked the distinction which the supreme court have since rendered so important, as on that ground alone to deny to the prisoner the privilege of having his case reviewed in the federal courts. Under that decision, I am not at liberty

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to disregard so grave a distinction, and am compelled to inquire, if, perchance, the courts have the power, does it follow that the judges out of court possess it also? If so, whence does it flow? Not from the constitution, for that is silent on the subject—not from the treaty, for that is equally silent—not from any express statutory enactment, for the want of that has been throughout the whole case the great ground of complaint—and not from necessary implication from any power otherwise granted. It seems to me, then, that it can trace its origin to no other source than the necessity or convenience of the case. When we are brought to this point, then, the whole course of reasoning on which was founded my decision, that the police magistrate acted without authority, becomes equally applicable to the district judge. In the absence of any provision of the constitution, of the treaty, or of the statute, conferring the power upon that officer, I am compelled, by the view which I then took of the case, and which was acquiesced in on all hands, to arrive at the same conclusion as to his power.

It is with unfeigned diffidence, and after long consideration, that I have imbibed a view of this case, so different from that entertained by the learned judge whose decision I am compelled, from my position, thus to review. His long experience, and the high respect which I entertain for his judicial character, might have inclined me to yield my own conviction to his, if his own opinion of the power of the United States court had been clear and decided, or if he had at all considered the power of a judge out of court; a distinction, I repeat, which has been rendered important by the subsequent decision of the supreme court of the United States.

There is another view of the case which has had its weight with me, and that is the mode of reviewing the decision of one of the federal judiciary, which is thus brought about. Such review is not ordinarily through the state tribunals, yet I see no way in which it can be avoided in this case. I was bound by the law of the sovereignty whose minister I am, under severe penalties, to allow the writ of habeas corpus. It was to the prisoner, under our laws, a writ of right. The United States

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supreme court having denied to him the privilege of carrying up the decision of the district judge directly for their review, he had a right to resort to the state tribunals as the conduit through which he can more indirectly pass to that ultimate tribunal, whose peculiar province it is to pass upon all questions arising under treaties made by the authority of the United States. The writ being returned before me, it was my duty to inquire into the cause of the prisoner's detention, and that not merely as it appeared on the warrant by which he was held, but as it might appear from any fact alleged before me, to show that his imprisonment or detention was unlawful, or that he was entitled to his discharge. (2 R. S. 569, § 50.) I have therefore, of necessity, gone behind the mandate of the president, and inquired into the legality of the foundation on which it rested. And finding it to be wanting in legal aliment necessary to support it, I have no alternative but to declare that the prisoner cannot lawfully be held under it.

It will be observed that I have in this opinion omitted to discuss many of the points raised before me on the several arguments, which have been had in the case. This omission has not arisen from any want on my part of attention to, and careful consideration of them, but solely from the belief that their discussion was not necessary to the determination of the case, on which I was to render my judgment. There is, however, one topic, on which I differ in opinion with the learned district judge, which strikes me with so much force that I cannot forbear dwelling a moment upon it. The Spanish treaty, which has been already alluded to, contained a stipulation as to the ratification and confirmation of certain grants of land therein mentioned. The English side of the treaty contained, in that regard, the words "shall be ratified and confirmed." The United States supreme court, in construing those words, in *Foster v. Neilson*, (2 Peters, 253,) held that they imported a contract to be performed at some future time, and therefore, as has been already mentioned, required legislation before that part of the treaty could become a rule for the courts. That treaty again came before the court in the *United States v. Percheman*,

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7 *Peters*, 87,) and there it was said that the treaty was drawn up in the Spanish as well as the English language. Both were originals and were unquestionably intended by the parties to be identical. The Spanish had been translated, and they then understood that the article (of the treaty,) as expressed in that language, was that the grants "shall remain ratified and confirmed," &c. The court then holds that if the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed" are properly words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they shall be ratified and confirmed by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, we think the construction proper if not unavoidable. To apply that principle to the case in hand. The convention with France, under consideration, is drawn up in the French as well as the English language. In the latter language, when the party to be surrendered is spoken of, he is twice spoken of as the person "charged" and twice as the person "accused." In the French counterpart, the expression is uniformly *accusé*; "*les individus accusés*,"—" *les individus qui accusés*"—" *les individus qui seront accusés*"—" *L'individu ainsi accusé*." It appears from the opinion of the learned district judge, that it was claimed before him that this French phrase was equivalent to the term in our law indicted or arraigned, and that it was proved before him that such is the understanding of the term by the bar and the courts in France: *inculpe* and *prevenue* designate persons against whom criminal charges or proceedings are instituted, up to the period when the charges are acted upon by the *chambre de conseil*, and an accusation is decreed by it, and then, and not before, they become *accusés*. (*Code d'inst. Crim. Arts*, 127, 128, 241, 265.) The same question, then, arises here that arose under the Spanish

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treaty. Which language is to prevail in the construction? If the English, then a party merely "charged" or "accused" before the committing magistrate may be demanded. The prisoner is in that precise situation. He has been charged or accused before a magistrate authorized to arrest, and nothing more. But if the French phrase is to prevail, then the prisoner does not come within the treaty, because he has never been indicted or arraigned, never been *mis en accusation*-(c)

There is a great difference in the French practice, as well as in ours, between a person merely charged with a crime and one who has been indicted; between *inculpe* and *accusee*. There is much more solemnity in the latter than in the former—more probability of guilt. A farther progress toward conviction has been attained, and the questions both as to the guilt of the prisoner, and the nature of the offence, no longer rest merely upon the untried and uninvestigated complaint of a party, but have been investigated by the proper tribunal, the grand jury, or the *chambre de conseil*, and probable cause for the accusation being duly found, and the nature of the offence charged duly defined. This is an important consideration; for it is not every offence with which a person may be charged, for which he can be surrendered. It is only a few specified cases: and it often becomes an extremely difficult question for courts, even after the fact is established, to ascertain the nature of the offence growing out of it.

(c) It was held, that in the case of *The British Prisoners*, referred to in notes (a) and (b), that an application under the treaty with Great Britain need not be founded on a previous indictment found against the persons whose surrender is sought by the British tribunals, nor on any warrant issuing therefrom. But such applications are founded on the tenth article of the British treaty; which varies from the corresponding article in the French treaty. It expressly provides for an examination of the evidence of criminality, by some magistrate in the place or country where the supposed offender is arrested. The fugitive may merely be *charged* with one of the crimes specified in the treaty as having been committed within the jurisdiction of Great Britain, and may *seek an asylum* or *be found* within our territories; and then a magistrate here is empowered to issue his warrant, and arrest the fugitive, and himself examine into the imputed offence, before committing him, and unless satisfied of his guilt, will not detain him. And the court says this evidently was intended to reach cases where no such examination had been made elsewhere.

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In this case, it is very difficult, if not quite impracticable, for an American lawyer to determine whether the act charged upon the prisoner was forgery under the French law. If the matter had passed through the *chambre de conseil*, and the prisoner had been *mis en accusation*, had become *accusee*, it would have been judicially determined that if the prisoner had done the acts imputed to him, it would constitute the crime of forgery; but now the complexion of the act, whether forgery or not, rests in a great measure, if not solely, on the charge of the complainant. So, too, under our law, it is often difficult to define the boundary between breach of trust and constructive larceny; between mere fraud and the felony of obtaining money under false pretences. And when we come to the exercise of so important a duty as the surrender of a native or naturalized citizen upon the demand of a foreign nation, to be tried in a foreign judicatory, shall it depend on the complexion which the anger or malice of the complainant may give to the case, or shall it obtain its hue from the investigation which the grand jury, or the *chambre de conseil*, may subject it to? These inquiries are too important to have escaped the attention of the contracting parties; and hence we find a phrase, having a definite meaning in the French code, entirely inconsistent with the idea of allowing so important a consideration as extradition to rest upon the color which the complainant may give the matter, purposely, repeatedly and carefully used, in a manner which, under our law, gives it controlling influence over both parties to the treaty. So that a person demanded of the French government by ours, would not be surrendered, unless he had been indicted, or *mis en accusation*. At all events, the French government might so act with great propriety, and point to the language it had carefully used in the convention, as a perfect answer to the demand. Entire reciprocity was evidently aimed at by both parties, and I cannot conceive a reason why the language of the supreme court, in regard to the Spanish treaty, does not apply here with equal force, and why I am not bound to hold, as the supreme court then held, that if the English and French parts can without

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violence be made to agree, that construction which establishes this conformity ought to prevail, and that no violence will be done to the language of the treaty by a construction which conforms the English and French to each other. If this construction is to prevail, then it is inevitable that the prisoner is not within the treaty, and cannot be demanded by the French government, nor surrendered by the American; but is entitled to the protection of the laws of this state against the attempt to surrender him.

The conclusion then at which I have arrived is, that the prisoner is not a party accused—*mis en accusation*—within the meaning of the treaty; and that the president cannot execute the power of extradition without both legislative and judicial sanction previously obtained. And I acknowledge that the conclusion commends itself to my favor, because of the protection it is calculated to afford to personal liberty against executive authority.

The prisoner must therefore be discharged.

SAME TERM. *Before the same Justice.*

THE MECHANICS' BANK vs. EDWARDS and others.

It is an unquestionable rule of equity, that where one creditor has a lien on two funds, and another creditor has a lien upon only one of those funds, the latter has a right to demand that the former shall have recourse first to the fund on which he alone has a claim, before resorting to the other.

In 1836, S. and E. conveyed 100 lots to the F. L. and T. Co., by deed in fee, for the consideration expressed therein of \$170,000; upon which the company gave to S. and E. 170 certificates of \$1000 each, each certificate purporting that S. and E. had deposited with the company \$1000 in trust, which was so to remain for 20 years, to bear an interest of 5 per cent; the principal to be payable at the end of 20 years. An agreement and declaration of trust was executed between S. and E. and the company, declaring that the conveyance was on trust, that enough of the \$170,000 of certificates should be applied to paying off incumbrances on the lots, and that the lots should be conveyed by the company, from time to time, to such persons as S. and E. should appoint; the company to receive the rents

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and purchase money until they should be reimbursed the \$170,000 and interest; upon which they were to reconvey to S. and E. such of the lots as might remain unsold. And S. and E. covenanted to pay to the company any deficiency which might exist, on account of the difference between the avails of such sales and the \$170,000 advanced, with interest. In 1842, S. and E. released to the company their reversionary interest in the lots, and discharged the company from the performance of the trust; and the company discharged them from their indebtedness under the agreement and declaration of trust. *Held*, that the estate of the company, under the trust deed of 1836, did not merge in the release of 1842, so as to let in a decree obtained by the company against S. and E. in 1839, to become an incumbrance on the premises, and to be entitled to priority of payment out of the same.

Held also, that the trust created by the arrangement between S. & E. and the company was such a trust as the company was authorized by its charter to accept and execute.

The doctrine of merger is never regarded with favor in a court of equity. For it as frequently violates, as effectuates, the intention of the parties.

Merger is never allowed in equity, except for special reasons, and to carry out the intention of parties. Estates are kept distinct when the interest of creditors requires it.

It is not competent for a subsequent mortgagee to set up usury in the first lien.

That is a personal defence, confined to the borrower, his sureties, heirs, devisees and representatives; or to those persons only who are bound, by the original contract, to pay the sum borrowed.

IN EQUITY. The plaintiffs filed their bill to foreclose a mortgage executed by the defendant Edwards, on a lot known as No. 23 Nassau-street; and upon a sale on that foreclosure there was a surplus of \$3439,15.

The Farmers' Loan and Trust Company interposed a claim to that surplus, by virtue of a decree of the late court of chancery, in their favor, against Edwards and one Morgan L. Smith, for \$8399,30, docketed 20 December, 1839, which was a general lien, and not a specific one, on the mortgaged premises. Henry Cotheal claimed the surplus under a mortgage on the same premises, No. 23 Nassau-street, for \$10,000, executed by the defendant Edwards to him, and bearing date on the 22d December, 1840.

On a reference to a master, it appeared that on the 6th of June, 1836, Edwards and Smith being the owners of 100 lots of ground in the city of New-York, valued by them at \$277,000, proposed to the Farmers' Loan and Trust Company to execute

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to them a trust of the property at a valuation of \$230,000. After some negotiation, an arrangement was made whereby Smith and Edwards, on the 1st of September, 1836, conveyed the 100 lots to the Farmers' Loan and Trust Company in fee, by full covenant deed, for the consideration expressed therein of \$170,000; and the company gave to Smith and Edwards 170 certificates of \$1000 each, each purporting that Smith and Edwards had deposited with the company \$1000 in trust which was so to remain for 20 years, and be irredeemable for that period, on which interest at 5 per cent should be payable semi-annually to Smith and Edwards, or their assigns, on presentation of the coupons annexed; and the principal was payable to Smith and Edwards, or their assigns, on the 1st of September, 1856. At the same time an agreement and declaration of trust was executed between Smith and Edwards and the company, whereby it was recited that Smith and Edwards were the owners of 85 lots of ground in the city of New-York, which were subject to various incumbrances, and had conveyed the same to the company. And it was declared that such conveyance was on trust, that enough of the \$170,000 of certificates should be applied to paying off the incumbrances on the lots conveyed, and that the property should be conveyed by the company from time to time to such persons as Smith and Edwards should appoint; the company to receive the rents and purchase money until they should be reimbursed the \$170,000 with interest at the rate of 7 per cent. Upon such reimbursement, the company were to reconvey to Smith and Edwards such of the lots as might remain unsold. And Smith and Edwards covenanted to pay to the company any deficiency which might exist on account of the difference between the avails of such sales and the \$170,000 advanced, with 7 per cent interest as aforesaid. It was proved before the master that at the time these certificates were given, they had a value in market of from 8 to 10 per cent below par, and that fact was known to the company.

On the 23d of September, 1841, Smith and Edwards having failed to make any payments to the company, of either principal or interest, and the amount then due from them to the

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company being about \$240,000, another arrangement was made between them, whereby Smith and Edwards released to the company their reversionary interest in the 85 lots, and discharged the company from the performance of the trust, and the company discharged them from their indebtedness under the agreement and declaration of trust; the 85 lots being worth at that time about \$115,000.

It appeared before the master that the decree under which the Farmers' Loan and Trust Company claimed the surplus, was in no wise connected with the transaction of the 85 lots.

The master reported that the Farmers' Loan and Trust Company had a prior claim to the surplus; and the cause now came on to be heard on exceptions to his report.

A. Thompson & W. Kent, for Cotheal, insisted that the decree of the Farmers' Loan and Trust Company being a general lien on all the property of Smith and Edwards, the defendants therein, they were bound first to resort to other property of their debtors, before coming down upon that on which Cotheal had a specific lien by virtue of his mortgage. That in the application of this principle, the company were bound first to exhaust their remedy on the 85 lots, which would be an ample security for them, because, 1. The transaction between Smith and Edwards and the Farmers' Loan and Trust Company, in regard to the 85 lots, was in fact a loan, and as such void because usurious. 2. It was void also because made in contravention of the acts incorporating the company. 3. That transaction, whether it was a loan secured by a mortgage, or a trust, was merged in the release of 1842, and thereby the property was discharged from the lien of that transaction, and became subjected to the lien of the decree of the Farmers' Loan and Trust Company on which they now claim the surplus in court. They cited 18 *Wend.* 591; 6 *Paige*, 19; 11 *John. R.* 534; 2 *Cowen*, 195; 6 *John. R.* 290; 15 *id.* 319; 10 *Paige*, 68; 3 *Powell*, 1088; 1 *Sim. & Stu.* 369; 18 *Ves.* 384; 7 *Paige*, 248; 11 *Serg. & Rawle*, 208; 7 *Paige*, 617; 1 *Hall's R.* 480; 8

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Paige, 639 ; 2 *Cowen*, 678 ; 2 *Bl. Com.* 177 ; 3 *Prest. on Est.* 43, 55, 177 ; *Sug. on Vend.* 352.

W. C. Noyes, for the Farmers' Loan and Trust Company, made the following points: I. The decree of the company being the oldest lien, they were entitled to the surplus. II. The matters growing out of the trust have nothing whatever to do with the right of priority as between the two claims upon the fund. The most that was pretended on the part of Mr. Cotheal was that the company was bound, in the first instance, to collect their decree out of the 85 lots, upon the equitable principle that where a party has two funds, out of which he may collect his debt, he shall proceed in the first instance against that upon which the other party has no claim. This principle, however, has no application to the present case ; nor if well founded, was the master authorized to entertain it. The right could only be asserted upon a bill or a decree upon which all the equities of the parties could be adjusted. Besides, it would be grossly inequitable to apply that doctrine in this case. (6 *John. Ch. Rep.* 417, *James v. Johnson*. *S. C.*, 2 *Cowen*, 246. *Starr v. Ellis*, 6 *John.* 393.) III. The transaction between the company and Smith and Edwards was a trust, and not a mortgage. IV. That transaction was not usurious. (*Bank of Utica v. Post*, 8 *Paige*, 639. *S. C.*, 7 *Hill*, 391.) V. Nor was it illegal, or unauthorized by the charter of the company, or by the restraining act. (6 *Watts & Serg.* 227. *Lewin on Trusts*, 498, 512. *Craig v. Duval*, 2 *Wheat.* 45. *Cooper v. Whitney*, 3 *Hill*, 95.)

VI. Whatever may have been the true character of that transaction, it was all closed by the conveyance on the 23d of September, 1841, of the trust property to the company ; and no third party has a right to interfere with, or question, the settlement then made. This would be the case, even if it was usurious. (*Denn v. Dodds*, 1 *John. Cas.* 158. *Pratt v. Adams*, 7 *Paige*, 641. *Comyn on Usury*, 187.) And besides, the company had no notice of Cotheal's mortgage, and cannot be charged with constructive notice from its being recorded.

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VII. The exception to the master's report should be overruled, with costs.

EDMONDS, J. It is unquestionably a rule in equity that where one creditor has a lien on two funds, and another creditor has a lien upon only one of those funds, the latter has a right to demand that the former shall have recourse first to the fund on which he alone has a claim, before resorting to the other, to which alone the latter can betake himself for satisfaction of his claim.

I will not stop to consider the question raised at the bar, whether the matter now before me is in such a shape as to allow that principle properly to be carried out in this case; because if I shall find it to be applicable, and there is this difficulty in the case, I can at all events stay all proceedings on the distribution of the surplus, until the question can properly be brought before the court.

The first thing to be ascertained is, whether the principle is applicable to the case before me. The decree of the Farmers' Loan and Trust Company being prior in point of time, to Co-theal's mortgage, is entitled, in equity, as well as at law, to be first paid; unless some superior equity has been created in favor of the mortgage.

The mere fact that the mortgage is a specific lien only on the premises out of which the surplus in question has flowed, while the decree is a general lien upon other property of the debtor, as well as on these premises, is not of itself enough to establish such superior equity. Therefore, other grounds on which to build such superior equity were sought after on the argument, and I now proceed to consider them.

I will first consider that which was most strenuously urged on the argument, namely, that the first claim of the company was merged in the subsequent release, and that therefore the premises affected by those arrangements, were discharged from that claim, and were thereby subjected to the lien of the decree, and thus constituted a fund to which resort must first be had in satisfaction of the decree. This aspect of the claim is found-

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ed entirely on the technical doctrine of merger, a doctrine never regarded with favor in a court of equity. (3 *Prest. on Est.* 558. 1 *Atk.* 592. *Shep. Touch.* 121. *Phillips v. Phillips*, 1 *P. Wms.* 41.) For it as frequently violates, as effectuates, the intention of the parties. This case, if the doctrine should be applied, would be a striking illustration of this truth; as no one can for a moment imagine that it was the intention either of the company or of Smith and Edwards, by the release of 1842, to discharge the 85 lots from the claim of the company, and subject them to the other debts of Smith and Edwards. On the contrary, the intention is very plain, that the object was to preserve and enforce that claim and make it available to the company. On the other hand, merger is never allowed in equity, except for special reasons and to promote the intention of the parties. (3 *Prest. on Est.* 408. 1 *P. Wms.* 41.) Thus, where there is a confusion of rights, so that at law there would be an immediate merger, equity acting upon the intent, express or implied, will preserve them distinct. (*Lord Compton v. Oxenden*, 2 *Vesey, jun.* 264.) So where a tenant for life, paying off an incumbrance, takes an assignment, connecting it with the legal estate of inheritance, prima facie it might be a merger; unless there is evidence of an intention to continue the charge. (*St. Paul v. Dudley & Ward*, 15 *Ves.* 173.) So, in equity, the mortgage is not necessarily merged by union with the fee; the actual intention, not established by the acts of the party, will be presumed, from the greater advantage, against the merger. (*Forbes v. Moffat*, 18 *Ves.* 384.) The doctrine in equity is laid down very precisely by the master of the rolls in this case. "It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united." And Chancellor Kent, (4 *Com.* 102,) says that merger is not favored

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in equity, and is never allowed unless for special reasons, and to promote the intention of the parties. The intention is the governing principle in equity, and there it depends upon circumstances, and is governed by the intention, either express or implied, of the person in whom the estates unite, and the purposes of justice. (*Gardner v. Astor*, 3 *John. Ch. Rep.* 53. *Starr v. Ellis*, 6 *Id.* 393. *Lockwood v. Sturdevant*, 6 *Conn.* 373. *Denn v. Van Ness*, 5 *Halst.* 102.)

This being the rule in equity, it is too decisive of the main ground on which Cotheal's claim was made to rest, to render it necessary for me to consider the cases in which, for the benefit of the creditors, the estates are kept distinct, notwithstanding the doctrine of merger, and those in which the same rule obtains in respect to strangers, though as to parties and privies there may be a merger. In regard to these, it is laid down, (3 *Preston*, 447,) that notwithstanding the merger of the particular estate, persons who have interests affecting the estate which is merged, will be left in the same condition, in point of benefit, as if no merger had taken place.

Upon these principles, the intention of the parties, and the interest or benefit of the party in whom the estates unite, alike forbid my holding the estate of the Farmers' Loan and Trust Company under the deed of 1836, so merged in the release of 1842, as to let in the decree of 1839 to become an incumbrance on those premises, and entitled to priority of payment out of them.

This renders it necessary for me to consider the other grounds on which it is sought to set aside the claim of the company under the trust deed of 1836.

1. As to the usury. It is well established that this is a personal defence, and cannot be set up by a stranger to the original transaction. (*Reading v. Weston*, 7 *Conn.* 413. *De Wolf v. Johnson*, 10 *Wheat.* 367.) The chancellor, in *Cole v. Savage*, (10 *Paige*, 583,) attempted to overturn this rule, upon the strength of the revised statutes, (1 *R. S.* 772,) and the statute of 1837, (*Sess. L. of 1837*, p. 487, § 4,) and to extend the defence beyond the "borrower" and his sureties, heirs, devisees,

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and personal representatives, and confer it also upon the subsequent grantees of premises subject to a usurious mortgage. But the court for the correction of errors, in *Post v. Bank of Utica*, (7 *Hill*, 391,) overruled his decision, and even under our peculiar statutes, confined the defence to those persons only who were bound by the original contract to pay the sum borrowed. (*Livingston v. Harris*, 11 *Wend.* 329.) So that within those two cases, in our court of last resort, Cotheal has no right to set up that defence in this case. And it is therefore, unnecessary for me to inquire whether the transaction of 1836, between Smith and Edwards and the company, was usurious or not.

2. As to the alleged illegality of the transaction, under the acts incorporating and relating to the company.

Under the second section of the act of 1822, relating to this company, it was authorized to take and receive, by deed or devise, any effects and property, both real and personal, which might be left or conveyed to it in trust, and to assume, perform, and execute any trust which might be created or declared by any deed or devise as aforesaid. This is the general power of the corporation; and the trust created is, in form, at least, a strict compliance with the terms of the statute. The original application was for the company to receive the lands in trust. And the final arrangement was consummated by deeds which declared that they were so received, in trust to sell and pay certain money, or to reconvey. However strong, then, may be the suspicion that this whole arrangement was a mere devise to cover a loan secured by mortgage, or a transaction in violation of some of the restrictions attempted to be thrown around this company, I am not at liberty, upon the evidence before me, to pronounce it to be otherwise than a strict trust conformable to the power specially conferred on it by the legislature. There is indeed, no evidence before me that the transaction was any thing else than one of its authorized trusts; and I see nothing in the case to authorize me to set it aside.

The conclusion, then, at which I have arrived is, that there was no other fund on which the Farmers' Loan and Trust Company had a lien, or in which it had an interest, in respect

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to the decree of 1839, and to which, on the application of Cotheal, they might have been compelled in the first instance to resort; and that therefore it had a lien on the surplus in court prior to Cotheal's mortgage.

The master's report must be confirmed, and the exceptions be overruled with costs.

2 Farley 545

SAME TERM. *Before the same Justice.*

TALLMAN vs. FARLEY and others.

Where mortgaged premises are sold under a prior mortgage, and there is a surplus arising from the sale, which is brought into court, such surplus belongs to the mortgagees in a second mortgage, rather than to judgment creditors of the mortgagor; although their judgments are prior in date to the second mortgage.

Judgment creditors are entitled only to such rights in the real estate of the debtor as the debtor rightfully possesses. They can take all that belongs to the debtor, and nothing more.

IN EQUITY. The plaintiff was the owner of two lots of ground in the city of New-York, which he agreed to sell to the defendant Farley for \$2400 each. Farley entered into the negotiation for the purpose of building on the lots, but was unable to make any payment toward the consideration of the lots. It was thereupon agreed between Tallman, Farley, and Gerardus Clark, that Clark should advance to Farley \$5000 on each lot, to enable him to erect the buildings on them; that the deed from Tallman to Farley should not be delivered until sufficient money had been advanced by Clark, and expended by Farley on the buildings, to render the premises adequate security for the consideration money. And that then the consideration money should be secured by a mortgage on the lots, and the \$10,000 to be advanced by Clark should be secured by a second mortgage. Farley, in pursuance of this arrangement, took possession of the lots and began the erection of the buildings. In

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due time the deed from Tallman which had been left in escrow was delivered to Farley. At the same time he executed and delivered a mortgage to Tallman for the consideration money, and two mortgages for the \$10,000 to be advanced by Clark; one to Nicholas De Alfaro on one of the lots, for the \$5000 to be expended on the building on that lot, and another to Laurent Salles, for a like amount, on the other lot, to be expended for a like purpose. Farley, after the expenditure of the \$5000 on each lot, was unable to finish the buildings, but conveyed the lots to Clark, who completed the buildings by an expenditure of about \$5000 beyond the amount of the mortgages to Salles and De Alfaro. Tallman's mortgage not being paid, the bill was filed, in this suit, to foreclose it, and a decree for foreclosure and sale obtained. On the sale the property produced a surplus of about \$5000 over and above Tallman's mortgage. Salles and De Alfaro filed their claims to such surplus, under their mortgages. Sidney V. Smith, Frederick Coe, and others, interposed claims to the surplus by virtue of sundry judgments which they held against Farley, and which had been obtained and docketed in the county of New-York, at different periods, but all prior to the deed from Tallman to Farley, and prior, of course, to the mortgages to Salles and De Alfaro. The master, on a reference, reported that the mortgages to Salles and De Alfaro were the prior liens on the surplus. And the case now came on to be heard on exceptions taken by the judgment creditors to his report.

G. Clark, for the mortgagees, made the following points.

I. De Alfaro and Salles have a stronger equitable claim to this surplus than any other claimant, and must be preferred. And although as a general rule, if there be several equitable interests affecting the same estate, they will attach according to the respective periods at which they commenced, yet this general rule admits of exception, if any one of the parties hath more equity than the others; for he that hath the more equity shall be preferred. (1 *Powell on Mort.* 379. 2 *Ch. Ca.* 213. 2 *Ves. sen.* 486.) 1. Judgments being *general* liens only, are lia-

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ble to be displaced in a court of equity, and made subordinate to other claims of *greater* equity. (*Kiersted v. Avery*, 4 *Paige*, 15. *Morris v. Mowatt*, 9 *Id.* 586, 590. *White v. Carpenter*, *Id.* 266. *In re Howe*, 1 *Id.* 128. See also 1 *John. Ch.* 406.) 2. Judgments at law are never considered, in courts of equity, as of the same rank, as to lien, as mortgages; because although they are liens, they do not specifically charge lands, whereas mortgages do. (4 *Kent's Com.* 151, 154. 1 *Powell*, 435.) 3. Judgment creditors coming into a court of equity to enforce their rights, are subject to the rule of equity that he who will have equity must do equity: and hence it is well settled that if a judgment creditor comes into a court of equity to redeem against a purchaser who has made improvements without notice of the judgment, he must pay for the improvements. (*Benedict v. Gilman*, 4 *Paige*, 62. 2 *Ch. Cas.* 164. 5 *Bac. Ab.* 80, 82, *tit. Mortgage*. 2 *Ch. Pr.* 361.) And a mortgagee, for all purposes of this kind, is considered a purchaser, (10 *Paige*, 437,) and the record of the judgment is not a sufficient notice. (1 *Powell*, 496, 497. 1 *Com. Dig. tit. Mortgage*, 4 *A. 4. Pr. Cas. in Ch.* 37. *Atkinson on Titles*, 581. 4 *Paige*, 62.) 4. It is a rule also in equity, that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has the legal estate, but where he has a better title to call for the legal estate. (1 *Powell on Mort.* 397. 2 *Vern.* 599, 600.) 5. If an incumbrancer lies by, and sees that a second incumbrancer is lending his money on the same security, and does not inform him of it, he will lose his priority. (1 *Powell*, 366. 5 *Bac. Abr. tit. Mort.* 51.)

II. But there was an equitable mortgage in favor of the mortgagees, prior in time, to the judgment's attaching. 1. The purchase of the two lots in question from Tallman, and the giving of the deed by him was coupled with the condition that Farley (the purchaser) was to give a mortgage for the whole purchase money, and that he should raise the money to build on the lots by giving a second mortgage or mortgages to the present mortgagees, (or to Clark as their agent,) who were to advance the money to build with. And Tallman states ex-

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pressly that but for that agreement he would not have delivered the deed. It was all one transaction. 2. The property therefore came to Farley (if it came to him at all) subject to the above mentioned agreement to give Clark or his clients mortgages for the advances he should make, and which agreement was prior to the judgments' attaching, and the deed was delivered by Tallman to Clark pursuant to such arrangement. 3. Such an agreement is equivalent to an actual mortgage, and the land was therefore subject to this equity when the judgments attached. (*In Re Howe*, 1 *Paige*, 125, 128.) 4. The deposit of the title deeds with Clark constituted an equitable mortgage in favor of those he represents. (4 *Kent's Com.* 151, 154. 17 *Ves.* 230. 12 *Id.* 401. 2 *Sandf.* 9, 10.) 5 It is a rule in equity that where several persons have equal equity, he amongst them that hath possession of the legal estate, or the title deeds, shall be preferred although subsequent in point of time. (1 *Powell on Mort.* 381. 3 *P. Wms.* 280.) And in the latter case, a second mortgage was preferred to a former, because a mortgagee had possession of the title deeds. 6. But where the parties have not equal equity, those that have the greatest equity shall be relieved against the legal estate. (1 *Powell on Mort.* 438.)

III. The mortgages in the present case are equivalent to mortgages for the purchase money, which always had a preference, even before the statutory provision on the subject. (1 *Bro. C. C.* 424. *Amb.* 724. 3 *Atk.* 272. 1 *Vern.* 267. 2 *Ves.* 622. *Fonbl. Eq.* 381. 4 *Kent's Com.* 152.)

IV. Farley (the judgment debtor) never had any interest in the premises on which the judgment could attach. He never paid any thing. And a court of equity will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate. (*Kiersted v. Avery*, 4 *Paige*, 15. *Matter of Howe*, 1 *Id.* 128. *White v. Carpenter*. 2 *Id.* 266. *Atk. on Conv.* 172. *Gilb. Eq. Rep.* 13.)

V. Farley, so far as he became possessed of the property, was a mere trustee for the mortgagees, until the money advanced for the buildings should be paid. (*Garson v. Green*, 1 *John.*

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Ch. R. 308.) And the judgments were no liens as against the cestuis que trust. (1 *John. Ch. Rep.* 52.)

G. M. Ogden made the following points for the judgment creditors. I. The lien of the judgments of the defendant is superior to the lien of the second mortgages, and is the first and prior lien upon the whole of the surplus for the payment of the amount thereof, and interest thereon from and after the 21st day of February, 1846; because 1. The mortgage from Farley to the defendant Salles in fact was not delivered until some time after the delivery of the deed from George F. Tallman to Farley. 2. The delivery of the deed and the delivery of the mortgage could not have been so simultaneous as to shut out the lien of the judgments. 3. The lien of the judgments attached *eo instanti* that the title became vested in Farley.

II. The court will decree the payment of the judgments according to their legal priority; unless the defendants Salles and De Alfaro have greater equities, prior in point of time. III. There was no agreement between the second mortgagees, the complainant and Farley, by the operation of which the former was to have a lien superior to that of the said judgments: and the court will enforce the agreements of parties, but will not make agreements for them. IV. If the mortgages to the defendant Salles and De Alfaro are the prior lien upon the said surplus moneys to any extent or for any sum of money, they are such lien only for the sum or sums of money which had been, previously to the delivery of such mortgage, advanced by the defendants Salles and De Alfaro to Farley, on the faith of the contemplated security of such mortgage, or for such sums so previously advanced, and in addition for such sum or sums of money, if any, as were advanced on the faith of the security of such mortgages at the time of the delivery thereof.

EDMONDS, J. The judgment creditors come into this court to enforce the legal lien of their several judgments, and they claim that they are entitled to be first paid, because they are

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prior in point of time to the mortgages. It is not pretended that those creditors have made any advances, or incurred any liabilities, on the strength of the mortgaged premises; or that any agreement has ever been made between them and Farley, by which they were to have a specific lien on them. But they claim under the legal right growing out of the general lien of their judgments.

These judgment creditors are not in equity regarded as bona fide purchasers, and entitled to the consideration which equity gives them, when they become such without notice, for a valuable consideration actually paid; but they are looked upon simply as proceeding *in invitum*, to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party. (2 *Story's Eq.* 1502. *Langton v. Horton*, 1 *Hare*, 547. *Skeeles v. Shearly*, 3 *Myl. & Cr.* 112. *Story's Eq. Pl.* § 807, a.) Mortgagees however, who have advanced money on the credit of the land, are considered as bona fide purchasers. (*In Re Howe*, 1 *Paige*, 128.) Judgment creditors are entitled only to such rights in the premises as the judgment debtor rightfully possessed. (2 *Story's Eq.* § 1503, b. *Whitworth v. Gaugain*, 3 *Hare's R.* 416.) They can take all that belonged to the debtor, and nothing more. (*Langton v. Horton*, 1 *Hare's R.* 547. *Kiersted v. Avery*, 4 *Paige*, 15. *Morris v. Mowatt*, 2 *Id.* 590.) This principle is well established in equity jurisprudence. It is of frequent application in cases of trusts, and is entirely decisive of this case. For it cannot be pretended that the judgment debtor ever had any right to the premises, independent of the equitable rights of the second mortgagees. His title was taken in subordination to their claim, and the very value, out of which the surplus in question flowed, was produced solely by the money thus advanced to him. If the judgment creditors could find a moment of time in which their debtor had a right to sell or incumber the premises, in preference to the claim of the second mortgagees, they might perhaps find some aliment on which their legal claim might be fed. But no such time can be found: and as their debtor never had

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a right to alienate or encumber the premises to the exclusion of the second mortgagees, and as these judgment creditors can take only such right as their debtor had, they have no right in equity to the preference they now set up.

The master's report must be confirmed, with costs to be taxed.

SAME TERM. *Before the same Justice.*

In the matter of FLATBUSH AVENUE in the city of Brooklyn.

On an application to confirm the report of commissioners of estimate and assessment, affidavits made by persons who are only interested in the question, and not in the result of the proceedings before the court, may be read, in opposition to the motion. When private property is to be taken for the public use, it is important that all the forms of the law should be complied with; for those forms have been devised, and certain restrictions adopted, for the protection of private right against public oppression.

In all cases of public improvements, where private property is to be taken without the owner's consent, at the demand of a local corporation, it is essential to inquire whether all the requisitions of the statute have been complied with. And courts cannot allow any essential departure from them, without jeopardizing private rights, which have no adequate protection except in our courts.

The acts of the legislature relative to the city of Brooklyn, and the opening of streets and avenues therein, give no authority to proceed against unknown owners of lands; and if any of the owners of land required for a street are unknown, a lawful assessment cannot be made.

It is an inflexible rule of law, that no man shall be deprived of his property without an opportunity of defending himself. Upon this principle, a report of commissioners of estimate and assessment will not be confirmed if it contains an assessment upon property in Brooklyn belonging to unknown owners.

What degree of particularity is necessary, in describing the owners of property assessed for the opening of an avenue in the city of Brooklyn.

The commissioners are required by the statute, to specify in their report the respective interests of the owners, the amount awarded to the several parties interested, the amount assessed upon the different interests in the premises affected, and to designate the interests of the parties, and their liabilities in relation thereto. And if their report does not contain these particulars, it will not be confirmed.

Courts must obtain jurisdiction as well of the person to be affected by their judgment, as of the subject matter.

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It sometimes becomes necessary, especially in proceedings *in rem*, to proceed against persons who are unknown; but courts have no power to do so, unless the legislature has interposed, and by some sort of substituted service, given to the court jurisdiction over the person.

It is the duty of commissioners of estimate and assessment in the city of Brooklyn, to estimate the expenses of opening a street or avenue. This includes not merely the costs and expenses of making the assessment, but also the costs and charges of making the improvement, and the amounts to be paid for the lands and buildings required to be taken for it. And the several items of the expense should be stated in the report.

The commissioners are also required to estimate the benefit to be derived from the improvement, not only in the aggregate, but that to be derived by the parties respectively.

Where it appeared from the report of commissioners respecting the opening of an avenue, that such avenue crossed a public turnpike at two distant points, and thus opened a road whereby travellers could avoid the toll gate of the company, thereby materially injuring, if not destroying, the value of the franchise; for which injury the commissioners had not awarded any damages, but they had awarded the company two small sums for the damage arising from taking the road for the avenue, and had assessed them an equal amount for the expense of opening the avenue; the court refused to confirm the report.

The franchise which a turnpike company obtains from the legislature, by its act of incorporation, is as much the subject of value to the company as the private property of any individual. And they have as clear a right as any person owning land to be indemnified for an injury sustained by them in consequence of the appropriation of their property to the public use.

The doctrine that because a turnpike company derived its franchise from the same source from which the city of Brooklyn obtained its power to open an avenue, therefore the company are not entitled to any compensation for an injury to their property, is untenable.

N. F. Waring, for the corporation of Brooklyn, moved to confirm the report of commissioners of assessment and estimate of the expense of opening the above mentioned avenue.

J. Dykeman, for Mary Powers, objected to the confirmation.

1. Because she had not been awarded a fair amount of damages for her land taken for the avenue.
2. That she was assessed for benefits which did not exist.
3. That the whole expense of the improvement, including the damage for land taken, will far exceed the amount of benefits to be derived from the improvement.
4. That the report was not in the form required by the statute.
5. That the report contained no esti-

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mate of benefits, and no account of the expense of the improvement. 6. That it contained no statement of the principles on which the report was founded. He read a large number of affidavits which had been laid before the commissioners, going to show that the whole benefits of the improvement fell far short of the expenses.

Mr. Waring objected to the reading of some of the affidavits ; because made by some of the persons who had been assessed for damages or benefits. He cited *In re Cherry-street*, (19 *Wend.* 659 ;) *In re 29th-street*, (1 *Hill*, 191.)

Edmonds, J., overruled the objection ; saying that those cases related only to the admissibility of the affidavits of parties to the proceedings. That the affidavits now offered were of parties who were only interested in the question, and not in the result of the proceeding before the court ; that none of them had appealed ; nor could they be heard on the question of confirmation.

W. Rockwell, for the Jamaica and Flatbush Turnpike Company, objected to the confirmation, because the avenue in question crossed the turnpike at two distant points, and thus opened a road whereby travellers could avoid the toll gate of the company ; thereby materially injuring, if not destroying, the value of the franchise. For which injury the commissioners had not awarded any damages ; but they had awarded the company two small sums for the damage arising from taking the company's road for the avenue, and had assessed them an equal amount for the expense of opening the avenue. He cited *Bloodgood v. Mohawk R. R. Co.*, (18 *Wend.* 9 ;) *Fletcher v. Auburn R. R. Co.*, (25 *id.* 462 ;) *Trustees, &c. v. Auburn and Rochester R. R. Co.*, (3 *Hill*, 567 ;) *Seneca Road Co. v. The same*, (5 *Id.* 170.)

N. F. Waring, contra, insisted that the right of the turnpike company had been granted subject to the public wants, whose

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demands, as manifested in the laying out of this avenue, were superior to the company's right; and that the franchise was not the subject of damage within the statute, (*Charles River Bridge case*, 11 *Peters*, 420.)

EDMONDS, J. Under our institutions, no man can be deprived of his rights, save by the law of the land, or the judgment of his peers. Among the rights thus protected, is the right of private property. And when private property is to be taken, as in this case, for the public use, it is important that all the forms of the law should be complied with; for these forms have been devised, and certain restrictions adopted, for the protection of private right against public oppression.

In all cases of this kind, where private property is to be taken without the owner's consent, at the demand of a local corporation, it is essential to inquire whether all the requisitions of the statute have been complied with. And courts cannot allow any substantial departure from them, without jeopardizing private rights, which have no adequate protection, except in our courts.

It is under the guidance of such views that I proceed to examine this report, and the objections made to its confirmation.

As to unknown owners, &c.

The acts of the legislature under which these proceedings are had, nowhere give the authority to proceed against owners unknown. On the contrary, the second section of the act of 1833, to reduce the law incorporating the village of Brooklyn, and the several acts amendatory thereof, into one act, and to amend the same, (*Laws of 1833*, p. 499,) requires that the report of the commissioners shall contain "the names of the persons interested in the premises and a statement of their respective interests," and "the proportion of the expense of the improvement which each ought to bear." The second section of the act of 1838, relative to the city of Brooklyn, (*Laws of 1838*, p. 119,) is equally explicit. The report shall contain "the names of the persons interested in the property taken or assessed for the improvement, the amount awarded to the different parties interested in the lands and premises required for the improvement, the

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amount assessed on each piece of land and on the different interests therein," and "so many and such other different columns and tabular statements as may be necessary to designate the interests of parties in the lands and premises required for the improvement, and their liabilities in relation thereto."

There are several departures, in this report, from these explicit requirements of the statute, viz. "Estate of Thomas Poole, William Powers executor." "Burying ground, descendants of John Cowenhoven, deceased." "S. A. Willoughby and J. D. Lawrence, trustees." "Cornelia Jackson's trustees." "Estate of Hamilton H. Jackson." "Maria Jackson's trustees." "William S. Packer and others." "Estate of John Cowenhoven." "E. Waterbury and son." "Burying ground." "— Gilbert." "Unknown owners." "Unknown owners, or Long Island Railroad Company." All these specifications are wrong, because in disregard of the statute. The names of the parties are not given; nor is there any statement of their respective interests. There is no statement of the amount awarded to the several parties interested, nor of the amount assessed upon the different interests in the premises affected; nor is there any designation of the interests of the parties, or their liabilities in relation thereto. Yet all these are matters on which the commissioners are required by the statute to adjudicate; and when they omit so important a part of their duty, this court will not confirm their report.

The objection to the award to, or the assessment upon, "unknown owners," is still broader. It is an inflexible rule of law that no man shall be deprived of his property without an opportunity of defending himself. What opportunity do owners have of defending their rights, when they are proceeded against by a designation which embraces any other living being as well as them? Courts must obtain jurisdiction as well of the person to be affected by their judgment, as of the subject matter. What jurisdiction did the commissioners obtain, or has this court now got, over persons designated so generally as "unknown?" It sometimes becomes necessary, especially in proceedings like this, *in rem*, to proceed against persons who are unknown; but courts have no power to do so, unless the

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legislature has interposed, and by some sort of substituted service, given the court jurisdiction over the person. Hence frequent enactments occur in that respect. Thus, in proceedings for partition, our revised statutes have made such a provision. (2 R. S. 319, § 13. *Id.* 329, § 84.) And so strict have been the courts that a judgment in partition was held to be utterly void, because the record did not contain the averment that an affidavit was filed stating that the owner was unknown. (*Denning v. Corwin*, 11 *Wend.* 647.) In the laws relative to assessments in New-York, (2 R. L. 408, § 178,) and other cities, (*Sess. L. of 1829, 192, § 32, &c.*) similar provision is made for the case of "unknown owners." But no such provision is contained in the acts relative to assessments in Brooklyn. And if any of the owners there are unknown, a lawful assessment cannot be made. The legislature alone can provide the remedy; and until it does so, the courts cannot confirm such a report, without violating one of their most sacred principles of action; that, namely, of giving the party interested an adequate opportunity of being heard in defence of his right.

It was conceded on the argument, by all parties, that the award to Calkins and Darrow was erroneous, because it was for buildings erected after the act of 1835, (*Sess. L. of 1835, p. 139, § 13,*) and for which, by that act, the commissioners were forbidden to make any allowance, because erected in part or in whole on one of the avenues laid out by the commissioners appointed under that act.

It is the duty of the commissioners to estimate the expense of the improvement. This includes not merely the costs and charges of making the assessment, but also the costs and charges of making the improvement, and the amounts to be paid for the lands and buildings required to be taken for it. If the action of the commissioners in this respect was final, it might not be necessary for them to make any record of the items constituting this expense. But there are many reasons why they should disclose the basis of their judgment in this respect. If the assessment was not to be made until after the improvement was all completed, the expense of it would be a

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mere matter of calculation. The sums actually expended, being added together, would give the result, with entire certainty. But the assessment is to be made before the improvement is completed. The amount of the expense becomes therefore a matter of estimate only; requiring the exercise of judgment, and not of calculation alone.

The report is to be submitted to the court for confirmation; and if in any respect the commissioners have erred in their estimates, their decision may be reversed or corrected. Unless the basis of their decision is disclosed, and the items of expense set down, how can the court, to whom the report is offered for confirmation, determine whether it is right or wrong, either in the aggregate or as to particular items, or the value of particular lots? And how can parties know in what the error consists, or be able to point it out to the appellate tribunal? Take the case of Calkins and Darrow, (which it is conceded is an error,) as an instance. It is erroneous to award them damages for their buildings, yet correct to allow damages for their land. The award to them is \$1600, but the report does not say whether it is for land or buildings; and if the fact that part of it was for buildings had not been stated to the court, out of the report, the court would have had no means of determining whether the report was right or wrong, but might have ignorantly confirmed an award which is in direct contravention of the statute. It is with this view that the act of 1838, requires a map to be made which shall designate, by feet and inches, the several pieces of land necessary to be taken, and requires the commissioners to report the whole expense of the proposed improvement; *and the several items thereof*. This duty, the report almost entirely omits to perform. It gives only a few items, showing the expense of making the assessment, and nothing more. It no where shows what is the whole expense of the improvement, nor what are the items of expense growing out of the value of lands and buildings taken or growing out of making the improvement itself. The column in their tabular report, which is headed "Amount and items of expense of opening," has not an entry in it, from beginning to end, except

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five items of the expense of making the assessment. Certain sums are awarded, and certain sums are assessed, but whether those sums are legitimate items of the expense of the improvement, or arbitrary sums awarded by the commissioners, the report furnishes no means of ascertaining. And I am called upon to exercise the important function of pronouncing judgment upon this report, in profound ignorance of all the facts on which alone the judgment could safely be predicated.

The estimate of benefits is liable to the same objection. The commissioners are required to estimate the benefit to be derived from the improvement, not only in the aggregate, but that to be derived by the parties respectively. (*Laws of 1833, p. 499, §§ 1, 2.*) And the number of the pieces of the land assessed for benefits. (*Laws of 1838, p. 119, § 2.*) Of all this there is not a word in the report. There is simply an assessment of certain sums upon the owners supposed to be benefitted; but how much they are benefitted, in the aggregate, or respectively, is no where set down. The importance of this omission is apparent from these considerations. 1. That it is impossible for the court to determine, under the fourth section of the act of 1833, whether the assessment exceeds the value. 2. It is equally impossible to determine whether under the fifth section of that act, in any case, the estimated damages exceed the estimated benefits. And 3. It is also impracticable for me to perform the duty devolving upon me under the decision in 11 *Wendell*, 153, in the matter of *Albany-street*, where the court declared that where property is not and cannot be benefitted, to the extent of the amount assessed upon it, it is the duty of the court to send back the report until property can be found sufficiently benefitted to defray the expense, or until the proceedings shall be discontinued. I can learn from the report that the amount of damages awarded for lands and buildings taken for the improvement is \$52,590,74, and that the whole amount assessed for the improvement is \$57,078,65, but I can in no respect ascertain from the report whether the benefits to be derived from the improvement equal either of those sums.

Either of the objections stated in this brief review, which

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embraces all the allegations made on the part of Mrs. Powers against the confirmation of the report, would be sufficient to warrant me in sending it back; and I might have contented myself with the discussion of only one of them. But I have thought it advisable, in order, if possible, to prevent farther litigation, to consider all the objections; as a guide to future action in the matter. With the same view I proceed to consider the objections to the report which are raised by the turnpike company. It would seem from the statement made on the argument, and which I understood to be undisputed, that the opening of this avenue very materially impairs, if it does not entirely destroy, the value of the franchise of the company, by opening a road on which travellers may avoid their toll gate. For this injury the commissioners have not awarded any thing, so far as I can understand their report. In one place they have awarded the company \$20 for damages for land taken; and in the same breath have assigned them four times \$5 for benefits. And in another place they have awarded them \$30 as damages for land taken, and at the same moment assessed them six times \$5 for benefits. Thus virtually making to the company no allowance whatever for the very serious injury to the franchise which it was conceded this improvement would be. This was defended before me on the ground that the franchise was a public grant, subordinate to the public wants, at whose demand this avenue was laid out, and that it had been laid out by the same authority which had granted the franchise, viz. that of the legislature.

It is difficult for me to appreciate the grounds on which the commissioners refused to allow to the turnpike company any damage for the injury which they had confessedly sustained by the opening of this avenue. The franchise which they had obtained from the legislature, was as much the subject of value to them as the private property of any individual damaged by this improvement; and they had as clear a right as any individual to be indemnified for any injury which they might sustain by the appropriation of their property to the public use. The idea that, because the company derived its franchise from

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the same source from which the city of Brooklyn obtained its power to open this avenue, therefore the company were not entitled to any compensation for an injury to their property, is as untenable in law as it is unsound in morals. If this avenue had been merely a parallel road with the turnpike, perhaps the doctrine of the Charles River Bridge case (11 *Peters*, 420) might have been applicable. But such is not this case. At two points, this avenue invades and takes the land which the company had obtained under their act of incorporation; and thereby the company is brought directly within the statute under which the commissioners have proceeded, and which directs them, to estimate the damage to be sustained by the owners of such lands and buildings as may be affected by the improvement, (*Laws of 1833*, § 1,) and to make a statement of the damage which the persons interested in the premises taken have sustained from such improvement. (*Id.* § 2.)

The case of *The Seneca Road Co. v. The Auburn and Rochester Rail Road Co.*, (5 *Hill*, 170,) is decisive of the point that this turnpike company is entitled to recover the damage which it has actually sustained by this improvement. Whether that damage has been awarded to them, it is impossible for me to ascertain from this report. There is no statement as to the value of the land taken, of the damage it has sustained, or of the benefit it has derived from the improvement. And for this reason, if for none other, I must refuse to confirm the report.

The report must therefore be sent back, and the motion to confirm be denied, with costs. As the former commissioners have not acted in unison, I think it most advisable to appoint new commissioners.

SAME TERM. *Before the same Justice.*

In the matter of PRIME and others.

The act to abolish imprisonment for debt, and to punish fraudulent debtors, has a double aspect;—as a civil remedy, and as a criminal proceeding.

The proceedings under the act are never for the benefit of the creditors at large; except in the single instance of an assignment after the debtor has been convicted of a misdemeanor.

Previous to the execution of the assignment, the proceedings are for the benefit of the prosecuting creditor alone.

The prosecuting creditor is entitled to a preference over the creditors generally, either for himself alone, or for himself and others of a certain class.

It is not necessary that the refusal of the debtor to apply his assets to the payment of the judgment of the prosecuting creditor should be fraudulent, to authorize a warrant of arrest. It is enough that such refusal is illegal, in violation of law, and in contravention of rights acquired by the creditor under the statute. It then becomes unjust, because it is illegal.

And when it is established, by the judgment of a competent tribunal, that the prosecuting creditor has a valid claim against the defendant, and when it is also established as a matter of fact that the debtor has evidences of debt to which, as a matter of law, the creditor has a claim prior, and more potent, than the debtor himself, or any other creditor, it is illegal and unjust for him to attempt to deprive the prosecuting creditor of that right; especially with the object of wresting from him the preference which the law gives him, and conferring it upon others to whom the law does not give it.

THIS was an application under the "act to abolish imprisonment for debt, and to punish fraudulent debtors," (*Laws of 1831, p. 396,*) for a warrant to commit the defendants to close custody for unjustly refusing to apply their assets, amounting to some \$50,000, to the payment of a judgment obtained against them by the Jefferson County Bank, for \$89,915.31.

Geo. C. Sherman, for Jefferson County Bank.

N. Bowditch Blunt, for the defendants.

EDMONDS, J. There is no allegation of fraud or unfair dealing in the case, but it is on one side a claim by the bank, that under that statute they have obtained a preference over all

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other creditors, and that therefore it is unjust in Prime, Ward & Co. to refuse on demand thus to apply their assets; and on the other a claim by Prime, Ward & Co., that such preference would be unjust and would frustrate their intention to make an equal distribution of their effects, among all their creditors.

The question is one then merely of law, involving the construction of that statute, except that it may perhaps become necessary to consider a question of fact growing out of the terms of the demand and refusal.

The provisions of the statute applicable to this case are, that in all cases where a plaintiff has obtained a judgment founded upon contract, he may apply to a judge of this court for a warrant to arrest the defendant, upon satisfactory evidence to be adduced to such officer, that the defendant has rights in action, money or evidences of debt, which he unjustly refuses to apply to the payment of that judgment.

The defendants have been brought before me on such a warrant, and, as allowed by the statute, they have controverted the allegation of an unjust refusal. On that point, proof has been taken before me, and from the evidence it appears, that on the 29th of October, 1847, the defendant exhibited to the attorney of the bank a list of their assets, which he demanded that they should apply on its judgment, and that they refused to do so; at the same time avowing their readiness to make a general assignment for the benefit of all their creditors; and I am now called upon to take the next step authorized by the statute, namely, if I am satisfied that the allegations of the complainant are substantiated, to direct that the defendants be committed to the jail of the county, where they shall remain in custody in the same manner as other prisoners on criminal process, until they shall assign their property and obtain their discharge, as provided in that act.

The professed object of the statute is to abolish imprisonment for debt, and to punish fraudulent debtors; but it contains many provisions which aim only at enabling the creditor, in a certain class of cases, to enforce the collection of his demand. Thus, while it authorizes the commitment of the debtor to cus-

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tody as a prisoner on criminal process, and his conviction as being guilty of a misdemeanor, it permits him to be discharged from his commitment on paying the debt in question ; on giving security to pay the debt in sixty days ; on making an assignment of his property, or on giving a bond that he will within thirty days apply for an assignment of his property and a discharge.

And in analogy to the proceedings against one who has been convicted of crime, and sentenced to the state prison, (2 R. S. 14, art. 2,) when the debtor shall be thus convicted of the misdemeanor, trustees may be appointed to take charge of his property and distribute it among his creditors, and may have his person, any place occupied by him, his trunk or other article possessed by him, searched for money or evidence of debt to be delivered to the trustees.

The statute has then a double aspect, as a civil remedy and a criminal proceeding ; and it cannot be well understood without keeping this consideration constantly in view.

So far as it is a civil remedy, (except where the debtor may be induced by a fear of commitment to pay the particular debt,) it seeks to attain its purpose by means of an assignment of the debtor's property. And it is not a little singular that after fifteen years' practice under the law, it should at this moment be a matter of doubt for whose benefit such assignment shall be made—the creditors at large, or the pursuing creditor alone.

That question is now distinctly presented to me, and I cannot decide it without running counter either to the views of the supreme court, or to the court of chancery.

The question arises before me in this form : If the prosecuting creditor did, by his proceedings, obtain a right to priority of payment, then it was unjust for the defendants to refuse the demanded application of their assets, and a case is made out to warrant their commitment.

In *The People v. Abel*, (3 Hill, 109,) in *Berthelon v. Betts*, (4 Id. 577,) and in *Moak v. De Forest*, (5 Id. 605,) the supreme court clearly intimate their opinion that the proceeding under the act of 1831, is for the benefit of the prosecuting cred-

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itor, to enable him to collect his debt ; and that the assignment enures to his benefit rather than to that of all the creditors. While, on the contrary, the supreme court, in *Townsend v. Morrell*, (10 *Wend.* 577,) and the chancellor in *Spear & others v. Wardell*, (2 *Barb. Ch. Rep.* 291,)(a) as clearly intimate the contrary opinion ; and that if the imprisonment does not coerce from the debtor payment or security of the particular debt, but does coerce an assignment, that will be for the benefit of all the creditors.

When the case of the Wardells was before me as circuit judge, I intimated views similar to those afterwards expressed by the chancellor, though I purposely abstained from deciding the point. I committed the defendants in that case, because, on a demand being made of them, like that made of Prime, Ward & Co., they had refused to apply their assets to the payment of the particular judgment, on the ground of their intention to make an equal distribution among all their creditors. But I decided so to commit, not because I had arrived at a satisfactory conclusion on the point now again before me, but because of the opinion which the supreme court had intimated ; because the practice in the hall had been, as I was informed, in conformity with such an opinion, and in the expectation, that on my so ruling, the case would be taken to that court for review.

The supreme court, however, refused to review it : and if the decisions of our courts now remained in the same condition in which they were then, I might, on a matter where I find it so difficult to arrive at a satisfactory result, pursue the same course in this case which I adopted in that. But since that time the chancellor has intimated an opinion contrary to that on which I rested my decision to commit the Wardells, so that I am no longer at liberty to repose on an obiter dictum of the supreme court any more than on a similar opinion of the court of chancery ; and as there has not been, in either court, any express decision on the point, I am compelled, as far as may be practicable, amid these conflicting dicta, to arrive at a satisfactory

(a) The decision of the chancellor in this case was reversed by the court of appeals in January, 1848.

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conclusion for myself in reference to the meaning of this unhappy statute.

The proceedings under it have been sometimes regarded as in the nature of a statute execution, that is, as a statutory means of enforcing the payment of debts. In some respects this may be a just view. Thus, if the defendant before arrest, and in answer to a demand made under the 4th section, applies his evidence of debt to the payment of a judgment against him, it is *pro tanto* a means of enforcing payment of a debt. So, if after his arrest, and before his commitment, he does, under the 10th section, pay the debt, or give security for its payment in sixty days, it becomes a means of coercing satisfaction.

Thus far there is no reference to any other than the pursuing creditor, nor any other end apparently aimed at than the payment of his particular debt; and upon the satisfaction of that debt the proceedings end, and the frauds or injustice complained of are purged, except that for some portion of them the debtor may, under the 26th section, be indicted and convicted of a misdemeanor.

These proceedings which may thus result in the payment of the debt, do not seem to be preliminary to, or necessarily connected with, the ultimate conviction for a misdemeanor. Their whole object appears to be the payment of the debt, and their purpose fully to be answered when that end is attained: and thus far, it is most manifest that the principal object of the proceedings is a preference of the prosecuting creditor over all others; for when that preference is attained the proceeding ends.

Whether that same purpose continues to pervade the other proceedings under the statute, is the question before me. Before discussing that, I pause a moment to consider how far that purpose infects the end of the proceedings—the *ultima thule* of the statute—the conviction for a misdemeanor; for if the same purpose characterizes the beginning and the end of the proceedings, we should be much more ready to believe in its intended influence over the intermediate parts.

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By the 26th section of the act, a debtor who has been guilty of some of the acts which authorize his arrest in the first instance, under the 3d and 4th sections, may be convicted of a misdemeanor, and by section 27, trustees of his estate may be appointed, and those trustees are subject to the same duties and obligations as trustees appointed under the 2d article of title 1 of chapter 5 of the second part of the revised statutes, (2 *R. S.* 15, § 3; *Id.* 46, § 36,) those trustees are bound to distribute the estate in their hands among those who were creditors at the time of issuing the warrant. So that the first proceeding, which is founded on a mere charge of fraud, may result in lawfully giving the prosecuting creditor a preference over all other creditors, while the final proceeding, which is a conviction of fraud, necessarily results in depriving him of that preference, and places all on a par. About the matter thus far, that is the beginning and the end of the proceedings contemplated by the statute, there is no doubt; the one aims at a preference of the prosecuting creditor, and the other at equality among all creditors. How it is with the other proceedings under the statute, and which of these two conflicting opinions governs them, is the question.

When the debtor has been arrested on the warrant, and he does not pay the debt for which the prosecuting creditor is pursuing him, or secure its payment, he can avoid a commitment only by making an assignment of his property. For whose benefit is that assignment? The chancellor, in *Spear, &c. v. Wardell*, and Chief Justice Savage, in 10 *Wend.* 577, express their opinion that it is for that of all the creditors. Judge Bronson, in 3 *Hill*, 109, deems it to be for the benefit of the prosecuting creditor, and others who are situated like him in regard to proceedings under the statute; while Judge Cowen, in 5 *Hill*, 605, seems to suppose it is for the benefit of the prosecuting creditor alone.

These conflicting views tend to make more visible the obscurity through which I am compelled to grope my way to a clear view. I must therefore invoke the aid of any light which I may obtain from any of the provisions of the statute. I will

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therefore trace the proceedings through, to see if I can discover the end they aim at, in this regard.

To avoid the commitment when he does not pay or secure the prosecuting debt, the debtor must either make an inventory of his estate and an account of his creditors, and execute an assignment, on which the same proceedings shall be had as on a petition by the debtor, or give a bond that within thirty days he will apply for an assignment and discharge. (Section 10.) This application, by section 12, is to be by petition that his property may be assigned, and he have the benefit of the provisions of the act. That benefit, by section 17, is to exonerate him from being proceeded against for any fraud committed, or intended, by him before his discharge, not merely by that prosecuting creditor but by any creditor entitled to a dividend of his estate.

The benefit he prays for is not merely a discharge from the proceedings of the prosecuting creditor in respect to frauds affecting him alone, but from proceedings by any creditors entitled to proceed against him in respect to any fraud committed or intended by him. The proceedings, then, of the debtor to obtain a discharge are not against his prosecuting creditor alone, but also against all who, from their condition are entitled to proceed against him; and it can hardly be supposed that the statute intended that while he could thus be discharged in respect to a number of debts, that the surrender of his property, on which the discharge is founded, should be for the benefit of one of those creditors to the exclusion of others. He asks, however, for a discharge against more than the prosecuting creditor. With his petition, he is to present an account of his creditors, (§§ 10, 13.) Why this, if no one is interested in the proceeding except the prosecuting creditor? Under all the articles of title 1 of chapter 5 of the 2d part of the revised statutes, where the debtor applies for a discharge in respect to all his debts, by assigning his property for the benefit of all, he is required to present an account of his creditors; but under the single article (6th,) where he applies for a discharge only in respect to the prosecutor's debt, by assigning only for the benefit

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of that creditor, he is not required to present an account of his creditors. This becomes significant when we remember that this title of the revised statutes is frequently referred to in the act of 1831, whose provisions we are considering.

Besides his petition and the account of his creditors, the debtor is also to present an inventory of his estate, similar in all respects to that required by the above mentioned sixth article. The chancellor, in *Spear v. Wardell*, seems to regard this reference to the revised statutes as an oversight in the statute, because the sixth article contains no provision for an account of creditors. But I understand this reference to relate not to the account of creditors, but to the inventory of the estate, and for good reason. It must be constantly kept in mind that the sixth article here referred to, provides for an assignment for the benefit of the prosecuting creditor alone, and the inventory required from him is a very different thing from that required from the debtor when he assigns for the benefit of all. (*See 2 R. S. 31, § 4; 28, § 2; 17, § 5.*)

So that while the "account of creditors" seems to indicate that some one besides the prosecuting creditor may be interested in the proceeding, the "inventory of the estate" would seem to show that he alone was to be concerned. May not this apparent inconsistency be reconciled by adopting Judge Bronson's view of the statute, and regarding the assignment and the discharge as relating to the prosecuting creditor, and others so situated that they may become such under the statute?

The next step in the proceedings would seem to confirm this view. With his petition, account, and inventory, the debtor is to present his affidavit, similar to that required by the same sixth article. Now that affidavit is very different from the one required under the third and fifth articles, where the assignment is for the benefit of all. The difference consists in this, that under the articles where the assignment is general, the debtor is required to make oath that he has not paid, secured, or compounded with, any of his creditors, with a view to obtain the prayer of his petition, or with a view that they should

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abstain or desist from opposing his discharge. But that clause is not required in proceedings under the sixth article, where the assignment is for the prosecuting creditor alone; nor is it required in the proceedings under this act. This fact, in connection with another, namely, that articles three and five, which require this clause in the oath, also contain provisions denying a discharge to a debtor who has given a preference; and that article six, which does not require this clause, does not contain any such interdict against preferences, create quite a strong inference that a preference was contemplated; that at least it was not forbidden, if not distinctly aimed at throughout.

The next proceeding is for the debtor (section fourteen) to give fourteen days' notice of the presentation of his papers; and this he is to give not to all his creditors, but to the prosecuting creditor alone, thus looking as if he alone was to be regarded as interested. Yet the next section (fifteen) allows any creditor to oppose the application, thus looking as if all might be interested. Here, again, it may be asked if this apparent inconsistency is not reconcilable on Judge Bronson's view of the statute?

The next proceeding is the assignment, which is to be executed in the same manner and with the like effect as provided in the fifth article of the revised statutes. The chancellor, in *Spear v. Wardells*, understands this effect to be to vest the property in the assignee for the benefit of all, &c. This was my view of the case, when passing upon the application of the Wardells, and also, when the case now in hand first came before me. But from a more careful examination of the statute I see difficulties in the way. The sixteenth section of the act of 1831, says the assignment shall be executed with the like effect as declared in the fifth article. Now the fifth article does not declare the effect of the assignment to be for the benefit of all, as the chancellor supposes; and the sections which he cites as sustaining that view, are sections not of the fifth article but of the eighth article; and the statute of 1831, has not brought in any part of the eighth article to eke out the force and effect of the assignment. The fifth article, section

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nine, says, "the insolvent shall execute an assignment with the like effect as declared in the third article," and the third article, section twenty-eight, declares such assignment shall vest in the assignee all the interest at the time of executing the same in any estate or property, real or personal, whether legal or equitable." With a single exception, which I shall proceed to mention, this is all the "effect" which article five gives the assignment, and it is only when we pass to the sections in the eighth article, cited by the chancellor, that we find directions for distributing the property among all the creditors.

The exception I allude to is this: The assignment made under article five, vests in the assignee all the debtor's property except what is exempt from execution, while the assignment under the third article vests in the assignee all the property except wearing apparel and bedding, and the insolvent's arms and accoutrements as a militia man. I have among my papers the bill as it was reported to the house of assembly by the select committee, and on examining it I find that this reference was originally to the third article, so that the assignment would pass all but wearing apparel, bedding and arms, but the legislature altered it to the fifth article, so as to exempt from the operation of the assignment all the property that was exempt from execution. Hence the otherwise apparently awkward reference to the fifth article.

With this explanation, and on a careful examination of the several statutes, I find that all the effect given by the sixteenth section of the act of 1831, to the assignment, is to vest in the assignee all the interest of the insolvent, at the time of executing the same, in any estate or property real or personal, whether such interest be legal or equitable, except such as is exempt by law from execution, and that the effect is not by that section so to vest for the benefit of all creditors, and cannot be without invoking the aid of the eighth article, which the act of 1831 does not authorize.

Thus far as we have progressed in the history of the proceedings under this act, we have arrived at one conclusion; that the act does not in terms declare that the assignment is for the

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benefit of all creditors. Let us resume our progress, to see if we can discover, by necessary implication, for whose benefit it is in fact to be.

The next step is the discharge, (§ 17,) and that shall "exonerate the debtor from being proceeded against by any creditor entitled to a dividend, as hereinafter provided, under the 3, 4, 5, 6, 7, 8 and 9 sections of the act, for any fraud intended or committed before such discharge." By transposing the members of this sentence, we shall have less difficulty in arriving at its meaning. It shall "exonerate the debtor from being proceeded against under the 3d, &c., sections, for any fraud, &c., by any creditor entitled to a dividend as hereinafter provided." No creditor can proceed unless he has obtained a judgment or commenced a suit, and it is against the proceedings of such creditors alone that the discharge operates.

One thing must be constantly borne in mind, and that is, that throughout the whole of the act of 1831, the legislature have had constantly in view the insolvent laws of the state, as they then existed, and have repeatedly manifested their intention to apply to this new law the principles of those laws as far as was practicable.

One of those principles, which pervades them all, is that the distribution of property is among those who are affected by the discharge. Thus, under the 3d and 5th articles the discharge is from all debts owing at the time of the assignment, (2 *R. S.* 22, § 30. *Id.* 30, § 10;) and the distribution is among those who were creditors at that time. (2 *R. S.* 46, § 36.) Under the 4th article, (2 *R. S.* 27, § 17,) the discharge and the dividend, (2 *R. S.* 47,) are the same. Under the 6th article the debtor is discharged from his imprisonment, (2 *R. S.* 32, § 11,) and the dividend is among the creditors at whose suit he is imprisoned, (2 *R. S.* 47.) The same principle carried into the act of 1831, would again confirm Judge Bronson's view of the statute, and make the dividend among those against whom the debtor was discharged, that is, among those who were in the same situation with the prosecuting creditor.

The 18th section contains the provision made by the act of

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1831, for the powers and duties of the assignee. It declares they shall be all those specified in the 8th article of the revised statutes, and he shall be subject to the same duties, obligations and control, and shall make dividends. This section is undoubtedly the "hereinafter provided," mentioned in the 17th section, but unfortunately it does not aid us in the solution of the question under consideration; because the 8th article, which is referred to in such general terms, contains three distinct modes of distribution, viz: among all the creditors, among those alone who prosecute, and among those who prosecute and others who choose to join them. 2 R. S. 46, § 36, and the 18th section of the act of 1831, do not declare or even intimate which of these modes of distribution shall be adopted, but leave us where they found us in this respect. The statute does not itself profess to contain any farther provisions in reference to the assignment or the dividend than those I have already alluded to. It does, however, contain some other provisions calculated to show its general scope and intention, from which, in the absence of express provisions, we are to ascertain its particular intention in this respect.

Thus, by sections 20, 21, a debtor in actual custody when the act went into effect, may, on making an assignment, obtain his discharge from that imprisonment, and the proceedings thereon shall be as "hereinbefore provided:" that is, he shall make an inventory as required in the 6th article, take the oath required there, present a petition as required there, and receive a discharge in effect precisely the same as there specified. Is not the inference almost irresistible that the assignment he may make must be for the benefit of those alone in respect to whom he is discharged, and thus carry out the remaining principle, governing proceedings under the 6th article?

Again, by section 24, whenever a bond given under the 10th section shall become forfeited, it may be prosecuted by the pursuing creditor, not by all, and he may recover on it the amount of his claim, not that of other creditors. Now, under section 10 the bond is to be given to the pursuing creditor, not to all, and its penalty is to be double the amount claimed by him, not

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an amount claimed by others. The condition of the bond will be either that the debtor will, within thirty days, "apply for an assignment," or that he will not remove any of his property with intent to defraud any of his creditors, and that he will not assign or dispose of it with such intent, or with a view to give a preference to any creditor for any debt antecedent thereto, until the demand of the pursuing creditor shall be satisfied, &c. Thus the bond, and every thing connected with it, when it becomes forfeited by non-performance, look only to the satisfaction of the pursuing creditor. Again, all the remaining provisions of the statute which are intended to carry out its principles in reference to small demands prosecuted in courts of justices of the peace, aim only at the collection of the demand of the prosecuting creditor, and they enure to his benefit alone.

There is still another consideration, and the last, growing out of this examination of the statute. It is this, that up to the time when the defendant is convicted, before the officer issuing the warrant, no person but the prosecuting creditor has a right to take any part in the proceedings, to exercise any control over them, or to receive any benefit from them; but after such conviction, other creditors may take part, and become interested to this extent. They may oppose the debtor's application for a discharge, and his discharge, when granted, may exonerate him from imprisonment in respect to their claims. From this it would seem that up to the period of the conviction, the proceeding is for the benefit of the prosecuting creditor alone; after an assignment, other creditors may come in and be benefitted by it, and if the proceedings go to the extremity of an indictment for a misdemeanor, all the creditors are benefitted and affected by it.

I have thus carefully examined all the provisions of the act of 1831, with the view of gathering, as clearly as possible, its intention in respect to the question before me: and in spite of my preconceived notions on the subject—formed, it would seem, from a superficial examination of it—I have been inevitably conducted to the conclusion that the proceedings under the act are never for the benefit of the creditors at large, except in the

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single instance of an assignment after the debtor shall be convicted of the misdemeanor ; and that up to the execution of the assignment, they are for the benefit of the prosecuting creditor alone. Whether after the assignment, it shall enure to his exclusive benefit, or to the benefit of himself and others situated like him, (that is, persons who have commenced suits or obtained judgments and made demands,) is a question that I do not examine, or attempt to decide. It is enough for the decision of the question before me that I have arrived at the conclusion that the prosecuting creditor is entitled to a preference over the creditors generally, either for himself alone or for himself and others of a certain class ; for then it becomes "unjust" under the statute, for the debtor to resist or defeat his claim.

I do not understand that the refusal of the debtor to apply his assets to the payment of the prosecuting creditor's judgment should be fraudulent, to authorize a warrant of arrest. It is enough that the refusal be illegal, in violation of law, and in contravention of rights acquired by the creditor under the statute. It then becomes unjust, because it is illegal.

I draw this conclusion from the careful manner in which the statute uses the word "fraud." Whenever proceedings are taken under the act before the creditor obtains judgment on his demand, fraud must be made out, to warrant an arrest. Thus, we find these expressions in the statute : where the debtor is about to remove his property, "with intent to defraud his creditors," or has property or rights in action, "which he fraudulently conceals," or assigns or disposes of his property, or is about to do so, "with intent to defraud," or has "fraudulently contracted the debt." But when a judgment has been obtained, and the debtor refuses to apply his assets in payment of it, the statute does not say fraudulently refuses, but unjustly refuses ; and that in the same section where the terms "fraud" and "fraudulently" have been carefully used in regard to all the other grounds on which a warrant may issue.

So that when it shall be established by the judgment of a competent tribunal, that the prosecuting party has a valid claim against the defendant, and when it is also established as a mat-

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ter of fact, that the debtor has evidences of debt to which, as a matter of law, it is established that the creditor has a claim prior and more potent than the debtor himself or any other of his creditors, it is illegal and unjust for him to attempt to deprive his creditor of that right, and especially with the object of wresting from him the preference which the law gives him, and conferring it upon others to whom the law does not give it.

It is only necessary to contemplate the effect of a contrary rule, to appreciate its impropriety. The rights of these complainants to these assets being established to be superior to that of the defendants or their other creditors, upon what principle could I rule that it would be just for the debtors to deprive the complainants of this legal right, and confer it on some one else? Of what avail would it be to hold that the bank had this prior right, if it would be just for the defendants to disregard it, and distribute those assets among others? By such a ruling, this provision of the statute, which professes to give a remedy to a judgment creditor, would, at the option of the debtor, be rendered entirely inoperative.

It is not, therefore, necessary to make out fraud in such a case at this, to warrant a commitment, and I repeat it, none has been made out, or even imputed to the defendants, in this case. It has been merely an assertion, on their part, of a right to make an equal distribution of their assets, against a claim to a preference asserted on the other hand. And the law, as I understand it, being against them, the complainants are entitled, of course, to the remedy which the statute gives them to enforce their right, and that is the warrant to commit.

Order accordingly.

SAME TERM. *Edwards*, Justice.

CHAPIN vs. CLEMITSON.

Where a warrant of attorney was absolute upon its face, but upon the back of it there was an endorsement, signed by the defendant, stating that the judgment to be entered thereon was intended to secure an indebtedness of \$500 for goods to be sold on the day of the date of the warrant of attorney, and also to secure a similar amount for goods thereafter to be sold; and it was agreed that in case the plaintiff should deem himself insecure, he might issue execution for *whatever sum might be due to him*, for principal and interest; *Held* that the general expressions must be taken in connection with the particular provisions of the agreement; and that the plaintiff was only authorized to issue execution for the amounts intended to be secured by the judgment, and not for any indebtedness which had accrued previous to the time of executing the warrant of attorney.

A judgment recovered upon a warrant of attorney given to an individual member of a partnership firm, will, if given to secure a debt due to the firm, belong to the firm; and the person to whom such warrant is given will hold the judgment as trustee for the copartnership.

A satisfaction of such a judgment will amount to a satisfaction of the copartnership debt; and will be a complete discharge of the defendant therein from all claim on the part of the partnership.

Although the supreme court, on its law side, will exercise a general equitable control over judgments entered upon bond and warrant of attorney, it cannot on motion, relieve against a mistake in the agreement upon which such a judgment is entered up, by which mistake the judgment covers a smaller amount of indebtedness than it was the intention of the parties to secure.

It seems, the remedy of the plaintiff, in such a case, is to file a bill in equity for the purpose of correcting the alleged mistake in the agreement.

ON the 25th of August, 1847, a judgment was entered up against the defendant, on a bond and warrant of attorney, in the sum of \$1000. The warrant of attorney was absolute on its face, but upon the back of it there was an endorsement signed by the defendant, at the time of the execution of the warrant of attorney, stating that the judgment to be entered up thereon, was intended to secure an indebtedness for goods to be sold on the said 25th day of August, to the amount of \$500, and also to secure a similar amount for goods thereafter to be sold. And it was agreed that in case the plaintiff should deem himself insecure he might issue execution for whatever sum might be due to him for principal and interest.

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The plaintiff entered up judgment, and issued his execution, pursuant to the endorsement, and also for a sum of money which was due for goods sold previous to the 25th of August. A motion was made to set aside the judgment and execution. The affidavits on the part of the plaintiff, shewed that it was agreed between the parties that the judgment should apply to the indebtedness which accrued previous to the 25th of August, and that it was by mistake that such a provision was not contained in the endorsement.

J. G. McAdam, for the defendant. The plaintiff cannot come in here and set up a parol agreement varying from the contract on record. 1. Parol evidence is not admissible to contradict a written instrument. (6 *Hill*, 219. 1 *Id.* 606. 1 *John. Ch. Rep.* 429.) 2. A judgment such as this, for advances to be made, must be considered an usurious contract. (2 *Cowen*, 465.) 3. Where the plaintiff's damages, as in this case, are not ascertained by the cognovit, the plaintiff must proceed as on a default, to have his damages assessed. (*Graham's Prac.* 629.) Here the plaintiff has assessed his own damages.

Again, this judgment is given to one member of a firm, for a partnership debt, and this is not a discharge of the debt due the firm; unless the consent of the other partners be shown. One member of a firm has no right to take a judgment to himself, for a firm debt. (12 *Wend.* 396.)

Where a cognovit is given conditionally, then the conditions must be followed. (*Graham's Prac.* 1st ed. 629. 2 *Wm. Black.* 943.)

B. G. Hitchings, for the plaintiff. The plaintiff's affidavits show conclusively that the security was intended to include the indebtedness which had accrued prior to August 25. The writings in this case are all to be taken together, in order properly to understand the contract. It was expressly agreed that the plaintiff might issue execution on the judgment, for whatever should be due him. But the true character of the agreement may be established by parol; even if contradictory or explana-

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tory of the writing, because it is not a contract, but a mere memorandum like a receipt—and the courts have a right to amend, in conformity with the actual understanding, when the rights of subsequent creditors are not prejudiced. (16 *John. Rep.* 149. 1 *Dunlap's Prac.* 367. 9 *John. Rep.* 80. 1 *Taunt.* 413. 16 *John. Rep.* 4. 18 *Id.* 505. 16 *Id.* 165. 7 *Dowl. & Ry.* 824. *Note to Grah. Prac.* 779.)

EDWARDS, J. The warrant of attorney, and the endorsement upon it, taken together, constitute the agreement between the parties. It appears then, that the judgment to be entered up on the warrant of attorney, was intended to secure an indebtedness for goods *to be sold* on the 25th of August, the day of its execution, to the amount of \$500, and also to secure a similar amount for goods thereafter to be sold. There was a further provision that, in case the plaintiff should *deem himself insecure*, he might issue execution for whatever might be due to him for principal and interest, and collect the same. The general expressions must be taken in connection with the particular provisions of the agreement, and they clearly mean, that the plaintiff might issue execution for whatever might be due, according to the terms of the agreement; that is, for the amounts which were intended to be secured by the judgment. The plaintiff then had no claim under the said judgment for any indebtedness which had accrued previous to the time of executing the warrant of attorney.

But as to all goods sold on that day, or subsequently, and before the first of January succeeding, he had an undoubted right to issue his execution, provided he did not exceed the amount limited by the agreement. The fact that the goods sold by the plaintiff, and which constituted the consideration of the judgment, belonged to the partnership firm of which he was a member, can make no difference. The judgment given to him, if given to secure a partnership debt, would belong to the firm, and the plaintiff would hold it as trustee for them. And a satisfaction of the judgment would be a satisfaction of

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the debt, and a complete discharge of the defendant from all partnership claim.

It seems, however, from the affidavits read on the part of the plaintiff, that the original agreement between the parties was that the judgment should also secure the indebtedness of the defendant which had accrued before the first of August, and that it was by mistake that a different agreement was executed; and it is contended that this court, in the exercise of its equitable powers over judgments entered up on bond and warrant of attorney, can relieve against the mistake. Although this court will exercise a general equitable control over judgments of this nature, still, it has never done so to the extent claimed in this case.

But, inasmuch as the plaintiff's affidavits disclose a case in which the equity side of this court would, probably, give relief, it is proper that he should have an opportunity to make an application for that purpose.

The plaintiff in the judgment must therefore be stayed from any further proceedings under the execution, to collect the amount of indebtedness which accrued before the 25th of August last, or any part thereof, and he must pay the costs of this motion; unless he files his bill within twenty days, for the purpose of correcting the alleged mistake in the agreement. In which event, the judgment and execution, and the levy under it, shall remain as security for the payment of the indebtedness which accrued before the said 25th of August, until the final decision and decree in the suit in equity.

SAME TERM. *Edwards, Justice.*

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SANQUIRICO *vs.* BENEDETTI.

A court of equity will not enforce the specific performance of an agreement to sing, in concerts, operas, &c.

The difficulty, if not the utter impracticability, of compelling the performance of such an agreement, is a conclusive reason why a court of equity should refuse to interfere.

In such a case the party should be left to his remedy at law.

Neither will a court of equity restrain, by injunction, a breach of the negative part of such an agreement, viz. that the defendant will not make other engagements.

IN EQUITY. The bill of complaint alleged that the defendant had agreed with the complainant to perform and sing in concerts, operas, &c. throughout the United States and Canada, and that he would not make engagements with any other person. That he was about to make other engagements, and was about to leave the state. The bill prayed for a decree for specific performance, and also for an injunction, and a *ne exeat*. The defendant moved to dissolve the injunction, and discharge the *ne exeat*.

Theo. Sedgwick, for the defendant.

Robert Emmet, for the complainant.

EDWARDS, J. Although there may be cases in which a court of equity will decree specific performance of a contract for personal services, still, this is not one of that character. The difficulty, if not the utter impracticability, of compelling a specific performance of the contract set forth in the bill, is a conclusive reason why this court should refuse its interference. The complainant should be left to his remedy at law. If, however, there were any doubt, upon principle, yet, I consider it abundantly settled upon authority, that the complainant can have no relief upon the equity side of the court. The cases of *Kemble v. Kean*, (6 Sim. R. 333,) and *Hamblin v. Dinneford*,

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(2 *Edw.* 529,) are strictly analagous to this case. In each of those cases an injunction, which had been granted *ex parte*, was dissolved, on the grounds which I have above stated. And it was decided that the court would not only not interfere positively by a decree for specific performance, but that, on the other hand, it would not interfere negatively by the writ of injunction. In the case of *Corsetti v. De Rivafinoli*, (4 *Paige*, 264,) the chancellor clearly did not intend to lay down any different rule.

As this case is not one in which the court will grant relief, of course there is nothing to sustain the writ of *ne exeat*. The injunction must therefore be dissolved, and the writ of *ne exeat* discharged.

SAME TERM. *Edwards*, Justice.

AKRILL vs. SELDEN and others.

A court of equity will not interfere to restrain a mere trespass, when the injury is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation.

Unless the injury will be irreparable the court will leave the party to his remedy at law.

And there is the same reason why a court of equity should not interfere by restoring the complainant to the possession of premises in the occupation of the defendant, viz. that he has an adequate remedy at law.

If a court of equity should think it expedient to interfere, on the ground that there is not a sufficient legal remedy, it ought to do so by a direct decree to that effect, and not by an injunction issued at a preliminary stage of the cause, the indirect effect of which would be to compel the defendant to give up the possession to the complainant.

IN EQUITY. Application by the complainant for an injunction, and for an order to show cause why an attachment should not be issued for a violation of an order to show cause against an injunction. The bill was founded upon an agreement be-

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tween the parties respecting certain manufacturing works, which agreement the defendants insisted was a mere contract of hiring, and that it did not give to the plaintiff the right to the possession of the property. The motion was made previous to a decree in the cause establishing the rights of the parties, and while the defendants were in possession of the premises; and the injunction asked for was one which should direct the defendants to yield up the possession of the premises to the plaintiff.

A. Thompson, for the defendants.

C. Edwards, for the plaintiff.

EDWARDS, J. The complainant alleges that he was not in possession of the works mentioned in his agreement, at the time of filing his bill; but that, on the contrary, the defendants were in possession, claiming title, and alleging that the complainant had forfeited his right to the use of the works, by reason of a breach of his agreement. The question then is, not whether this court will, by the process of injunction, restrain an interference with the complainant's possession; but whether it will grant an injunction, the indirect effect of which will be to reinstate him in his possession. It is well settled, in this state, that a court of equity will not interfere to restrain a mere trespass, when the injury is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation. (*Stevens v. Beekman*, 1 *John. Ch.* 318. *Jerome v. Ross*, 7 *Id.* 315. *Hart v. Mayor, &c. of Albany*, 3 *Paige*, 213; 9 *Wend.* 571, *S. C.*)

Unless the injury will be irreparable, the court will leave the party to his remedy at law. There is the same reason why this court should not interfere by restoring the party to possession; that is, that he has an adequate remedy at law. But if this court should think it expedient to interfere, on the ground that there is not a sufficient legal remedy, it ought to do so by a direct decree to that effect, and not by an injunction issued at a preliminary stage of the cause, the indirect effect of which

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would be to compel the defendants to give up the possession to the complainant. The case of *Lane v. Newdigate*, (10 Ves. 192,) has not received the sanction of the court of chancery in England in its subsequent adjudications. But on the contrary, that court has declined to exercise its power through the medium of an injunction, to compel a party to do an act, by restraining him, or as was done by Lord Eldon, in the case of *Lane v. Newdigate*, by making it "difficult" for him to do the contrary. (*Blakeman v. The Glamorganshire Canal Navigation*, 1 Mylne & Keene, 158. *Decre v. Guest*, 1 Mylne & Craig, 516.) The rule laid down in these cases is the only safe one upon which a court of equity can act.

The next question is, whether there is sufficient ground for making an order to show cause why an attachment should not issue for the alleged breach of the preliminary order. It does not appear that the parties have done any thing to change the situation in which they were at the time of the making of the order. It was not intended by me to make an order which should have the effect of restoring the complainant to possession, but I meant merely to compel the parties to remain *in statu quo*, till the decision upon the motion for an injunction. The motion for an order to show cause, and also the motion for an injunction, must be denied. Costs to abide the event.

SAME TERM. *Edwards, Justice.*

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By the law, as it stood previous to the revised statutes, both a condonation of the defendant's offence, and acts of adultery on the part of the complainant, operated as a bar to a suit for a divorce.

But it seems the same effect was not given to a condonation of an act of adultery, set up by way of recrimination, as when set up on the part of the complainant.

The law regulating divorces being now regulated by statute, a condoned adultery

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of the complainant is not a defence to a suit for a divorce, unless made so by the statute.

And under the provisions of the revised statutes, as a condoned adultery of the defendant will not entitle the complainant to a divorce, so a condoned act of adultery on the part of the complainant will not bar his suit for a divorce.

The complainant, therefore, has a right to go into proof to show under what circumstances he has been guilty of the adultery which is set up as a bar to his suit; and to have the issues framed accordingly.

Where the defendant, in a suit for a divorce on the ground of adultery, sets up in her answer acts of adultery on the part of the complainant, as a bar to the suit, and the complainant files a replication to such answer, he thereby takes issue not only upon the recriminating charges contained in the answer, but he makes another issue, viz. that the adultery charged against him was not committed under such circumstances as would have entitled the defendant, if innocent, to a divorce.

And in such a case, the court is bound to frame an issue not only upon the charge of the complainant's adultery, but also upon the circumstances under which he was guilty, if required by him to do so; provided the circumstances alleged in the proposed issue are such as, under the provisions of the revised statutes, will be a bar to the defendant's charge.

Upon a reference to a master to settle issues, in a case thus situated, it is the duty of the master to decide, as a question of law, what circumstances, under the statute, will be a defence to the charge against the complainant, and to frame an issue accordingly.

Where a denial of the adultery charged in the bill, and a condonation, are set up in the answer, they are the subject of separate issues.

Where the defendant, in a suit for a divorce, sets up the adultery of the complainant, as a bar, she must state the name of the person with whom the adultery was committed, if the person is known. If the person is unknown, that fact should be stated in the answer, and in the issue.

There must also be reasonable certainty as to time and place.

What is a reasonable certainty.

IN EQUITY. This case comes before the court upon exceptions taken by the defendant to a master's report, in relation to certain amendments proposed by him to a feigned issue; and upon a motion by him to amend the order of reference.

The plaintiff filed his bill against the defendant, for a divorce, on the ground of adultery. In her answer, the defendant wholly denied the allegations in the bill, and set up, as a defence, the adultery of the complainant. A feigned issue was drawn up, and various amendments thereto proposed on the part of the defendant. And an order was made, referring it to a master to settle the issues. Upon the reference, it was contended on the part of the complainant, that the master, within

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the terms of the order of reference, could not allow the amendments proposed; and the master disallowed them.

H. P. Barber, for the defendant.

EDWARDS, J. There are two questions presented for my decision. The first arises upon the motion to amend the order of reference to the master, and the second upon the exceptions to the master's report. Upon the first motion there was a question raised as to regularity. With the view that I have taken of the subject, it will not be necessary for me to consider that question.

The objection which is made to the order of reference is, that in that part of the order which refers to the framing of issues, upon the recriminatory part of the answer, the issues were directed to be made up for the purpose of determining whether the complainant was guilty of any of the adulteries imputed to him in the answer, "under such circumstances as would entitle the defendant, if innocent, to a divorce." By the law, as it stood before the revised statutes, both a condonation of the defendant's offence, and acts of adultery on the part of the complainant, operated as a bar to a suit for a divorce. But it would seem that the same effect was not given to a condonation of an act of adultery set up by way of recrimination, as when set up on the part of the complainant. (*Beebe v. Beebe*, 1 *Hagg. Eccl. Rep.* 795. *Wood v. Wood*, 2 *Paige*, 108, 111.) The reason assigned for this rule was, that the complainant was not *rectus in curia*; and being equally guilty with the defendant, he was not entitled to the assistance of the court. But in reference to the question which is presented to me, I am not permitted to base my opinion upon the general principles applicable to equity jurisdiction.

The law regulating divorces is now the subject of statutory enactment. And a condoned adultery of the complainant is not a defence, unless made so by the statute. Under the provisions of the revised statutes, in reference to this subject, although the fact of adultery be established, the court may de-

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ny a divorce, "when it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would entitle the defendant, if innocent, to a divorce." (2 R. S. 145, § 42, sub. 4.) The question then arises, what are the circumstances under which the defendant, if innocent, would be entitled to a divorce? The circumstances must be those which are mentioned in the previous sections of the statute; for they contain all the provisions upon this subject. By section 38, it is enacted that "divorces may be decreed, and marriages may be dissolved, 1. When both husband and wife were inhabitants of this state, at the time of the commission of the offence: 2. When the marriage has been solemnized, or has taken place, within this state, and the injured party, at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this state: 3. When the offence has been committed in this state, and the injured party at the time of exhibiting the bill of complaint is an actual inhabitant of this state." And by section 42, "although the fact of adultery be established, the court may deny a divorce in the following cases: 1. Where the offence shall appear to have been committed by the procurement or with the connivance of the complainant: 2. When the offence charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof, or by the voluntary cohabitation of the parties, with the knowledge of the fact: 3. When there shall have been no express forgiveness, and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offence charged: 4. When it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce." The first, second, and third subdivisions of section 38, and the first, second, and third subdivisions of section 42, contain all the provisions which are made by the statute, in reference to the circumstances which would entitle a party, if innocent, to a divorce. It was contended, on the argument, that subdivision 4, section 42, referred

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to the three subdivisions of section 38, and not to the first three subdivisions of section 42. It may be that subdivision 4 of section 42, does refer to the subdivisions of section 38, but I know of no rule of construction by which I can make it refer to them exclusively. The subdivisions of section 38, refer to the place where the adultery was committed, the residence of the parties at the time, and the place where the marriage was solemnized. They do not refer to the circumstances connected with the act of adultery, but, rather to the situation of the parties at the time of the commission of the offence, or of exhibiting the bill of complaint, and that too, for the purpose of defining the jurisdiction of the court. On the other hand, the circumstances mentioned in the subdivisions of section 42, refer particularly to the circumstances under which the offence was committed, or resulting directly from its commission, that is, procurement or connivance, forgiveness, or a bar arising from lapse of time. If the defendant should be guilty of adultery under any of these circumstances, the complainant would not be entitled to a divorce; and it necessarily follows that the court would not deny a divorce on proof of the defendant's adultery, though it should be proved that the complainant had been guilty of adultery under any of the circumstances above mentioned. And that, as a condoned adultery of the defendant would not entitle the complainant to a divorce, so a condoned adultery on the part of the complainant would not bar a suit for a divorce. The complainant, then, has a right to go into proof to show under what circumstances he has been guilty of the adultery which is set up as a bar to his suit.

The next question is whether the alleged objectionable clause was properly inserted in the order of reference. The complainant, by filing his replication, took issue not only upon the recriminating charges contained in the answer, but he made another issue, viz. That the adultery charged against him was not committed under such circumstances as would have entitled the defendant, if innocent, to a divorce. The latter issue was as distinctly made as if the complainant had set it up formally in his replication. Not, it is true, upon the face of the

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pleadings, but by the operation of the statute. The court, then, were bound to frame an issue not only upon the charge of the complainant's adultery, but also upon the circumstances under which he was guilty, if required by him to do so; provided the circumstances alleged in the proposed issue were such as, under the provisions of the statute above cited, would have been a bar to the defendant's charge. The court, however, did not frame the issues, but delegated its powers to one of its officers; and, in doing so, it was proper that it should give him the directions contained in the order. The order, then, was substantially correct. But I have no doubt that the master erred in carrying out its directions. It was his duty to decide, as a question of law, what circumstances, under the statute, would be a defence to the charge against the complainant, and to frame an issue of fact accordingly. This he has not done, but, on the contrary, has referred it to the jury to decide whether the complainant had been "guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce." It is true, that he afterwards goes on to specify, under a *videlicet*, what those circumstances are; but this he has done, not in the form of a distinct issue on behalf of the complainant, as he should have done, but as a qualification of the issue on the part of the defendant; which is clearly irregular. Where a denial, and condonation, are set up, they are the subject of separate issues. (*See Rule 116, 4 Paige, 432.*) With these views, I am led to the conclusion that the first, second, and third exceptions to the master's report are well taken.

The next question arises upon the refusal of the master to allow the fourth, fifth, and sixth amendments proposed by the defendant.

The objection made to these amendments was, that the charges contained in them were not sufficiently definite. The rule upon this subject, as deducible from the decisions, seems to be that it is necessary to state the name of the person with whom the adultery was committed, if the person is known; but if the person is unknown, that fact should be stated in the

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answer, and in the issue. And that there must be reasonable certainty as to time and place. This leaves it, to a certain extent, to the judgment of the court to decide what is reasonable certainty. But, as in all cases of an analogous nature, the court will be governed, in exercising its judgment, by the standard which has been established by previous adjudications. The charge contained in the fourth proposed amendment is, that the complainant "on divers days during the months of June, July, August, September, and October, during the years 1844, 1845, 1846, and between the first day of June and the first day of November in the years aforesaid, at Fort Lee, Bull's Ferry, and Wehawken in the state of New Jersey, did repeatedly commit adultery with some female to defendant unknown; and more particularly, that the said complainant did, during the year 1846, commit adultery with the said female at a hotel at Fort Lee aforesaid." In this charge the person is alleged to be unknown, but the charge is confined to a single person. The places and times are mentioned, and the only question is whether they are stated with sufficient certainty. In the case of *Codd v. Codd*, (2 *John. Ch. Rep.* 224,) the charge was that the defendant "had, in numerous instances, both before and since their separation, committed adultery in this state, and elsewhere." In that case the person was not mentioned, nor alleged to be unknown, nor was the charge confined to a single person. The adultery was charged to have been committed in "this state, and elsewhere." A feigned issue was denied. In the next case, *Germond v. Germond*, (6 *John. Ch. Rep.* 347,) there was a charge of adultery committed in Rensselaer county, with a person named, and in "the city of New-York, with certain persons whose names were unknown." There were three counts framed upon these charges. The second charged, that the defendant had committed adultery in Rensselaer county, in May or July, 1817. And the third, that the defendant had committed adultery between the 1st of April, 1818, and the first of August, 1819, at the city of New-York. These counts were considered sufficiently definite as to time and place.

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In the case of *Ferguson v. Ferguson*, (1 Barb. Ch. Rep. 604,) the charge was that the defendant, between the day of his marriage in March, 1843, and the 30th of September, 1844, had been guilty of adultery with some female in the city of New-York, and an issue was framed upon that charge.

I consider the charge made by the defendant as containing the material for an issue, equally definite with those which were framed in the two last cases above cited. The charge is more definite as to place, than in either of those cases, and not less definite as to time, than in the last case.

The charge contained in the fifth proposed amendment does not mention any place, and is very general as to time.

The charge contained in the sixth proposed amendment is too general as to time; and it neither confines the charge to a single person, nor does it contain the necessary allegation that the persons are unknown.

The first, second, third and fourth exceptions are allowed, the fifth and sixth are disallowed. The motion to amend the order of reference must be denied. The matter must be referred back to the master, to settle the issues upon the principles above laid down.

KINGS GENERAL TERM, November, 1847. *Strong, Morse,
and Barculo*, Justices.

THE MAYOR, &c. OF NEW-YORK vs. BUTLER.

Where appraisers are chosen by parties to determine the amount of a claim arising under an agreement between them, with power to such appraisers to appoint an umpire to decide between them in case of their disagreement, they may appoint such umpire immediately, without waiting until a disagreement has arisen between them.

It is not a valid objection to an award made upon such a submission, that one of the appraisers signed the same, with the umpire. The authority originally given to the appraisers ceases upon the appointment of an umpire by them; and if either

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of them subsequently signs the award, his signature is a mere nullity. The award is the act of the umpire.

Where a submission merely authorizes the arbitrators to determine the amount due to one of the parties, they are only authorized to ascertain and fix that amount. They have no right to impose any condition upon the payment of it.

Where the operative part of an award differs, in terms, from the submission, but the recital refers correctly to the submission, the recital will raise a presumption that the award is in accordance with the submission. But the inference is not very strong, and may be rebutted.

It is a general rule that where the terms of a written instrument denoting the subject matter are equivocal, parol evidence may be admitted, to apply them to a particular subject matter.

An award is not rendered void merely because it does not appear from the award that one of the parties had notice of the time and place when and where the arbitrators met. A want of such notice may be proved, or it may appear expressly from the award; and then the objection would be fatal. But where it does not appear, it will not be presumed.

Where an award is indefinite as to the subjects investigated and determined, parol evidence is admissible to show that the arbitrator has exceeded his authority, and that therefore his award is null and void.

It is well settled that the evidence of an arbitrator cannot be received to impeach his own award. But the rule does not apply to a person originally appointed an arbitrator, but whose powers have been terminated by the appointment of an umpire, by whom the award was made.

The testimony of an arbitrator may be received to show that the arbitrators did not take a particular subject matter into consideration. That would not be an impeachment of the award, unless *mala fides* should be alleged.

Where a submission to arbitrators of a claim arising upon a building contract, on the part of the builder, relates exclusively to the additional cost occasioned by an *alteration* in the form or construction of the building as contemplated by the original design, the umpire has no right to make allowances, by way of deduction against the builder, for workmanship and materials alleged to be defective in those parts of the building not embraced in, or affected by, the alterations; especially where the claim of the builder for constructing those parts of the building has been settled, and paid.

If it appears from the face of an award that the arbitrators have included in it matters not referred to them, it is void, unless the amount of the items properly allowed can be ascertained, and separated from those not allowable.

An appointment of arbitrators originally good may become void by subsequent events.

After arbitrators have made a void award, a party has a right to consider the powers conferred upon them as virtually annulled, and to call for the selection of new arbitrators. He is not bound to renew the investigation before arbitrators who have already formed an opinion, and expressed it in a solemn manner.

Where an agreement provides that certain claims arising under the same shall be submitted to arbitrators, for their determination, and an actual submission to arbi-

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trators is made accordingly, which proves ineffectual, and the award made by them is null and void, and the arbitrators have become virtually incompetent to act, the rights of the parties remain the same as if there had been no appointment, or award, at all. And if, in such a case, either party refuses to join the other in making a new selection of arbitrators, he may be sued in an action at law by the other party, to recover the amount of his demand.

No party can insist upon a condition precedent when its non-performance has been caused by himself.

There may be an effectual waiver by parol of a condition specified in a written, or even in a sealed, contract.

The action of debt can in general be maintained for money due on a contract whenever the demand is capable of being readily reduced to a sum certain, upon the predicated statement of facts. And it is not necessary that every part of the plaintiff's claim should be established on the trial. The plaintiff may, in this form of action, recover less than the sum stated in his declaration to be due.

ERROR to the superior court of the city of New-York. An agreement was entered into on the 11th of May, 1835, between Butler, the defendant in error, and the mayor, aldermen and commonalty of the city of New-York, for the erection and completion by the former, of a certain public building called the Halls of Justice, upon the plan, and for the sum of money, therein specified. And it was further agreed that in case any *alteration* in the form, proportions, or construction of the building, or work, as described in the specification and drawings should be determined upon by the superintendent or architect, by which the cost of the work or building might be diminished or increased, the amount of such diminution or increase should (in case Butler and the said superintendent or architect did not mutually agree upon the same,) be determined by impartial appraisers to be chosen, one by the said Butler, and the other by the said superintendent or architect, or by an umpire to be appointed by such appraisers, to decide between them in case of their disagreement; and that such diminution or increase, being so agreed upon or ascertained, should be deducted from, or added to, the amount to be paid to Butler for erecting and completing the building. Butler brought an action of debt against the corporation, upon this agreement, alleging in his declaration, that certain alterations were made by the direction of the superintendent or architect; that they increased the cost; that he and

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the superintendent or architect did not agree upon the amount; that there had been an actual submission to arbitration, which had proved ineffectual; that he had subsequently offered to appoint an appraiser on his part, and requested the corporation to appoint another, which they had refused to do; and that such increase of cost amounted to a specified sum, which he claimed to recover. The defendants pleaded the general issue.

Upon the trial it was admitted in evidence, by the defendants, that the building mentioned in the written contract was erected by the plaintiff; and it was mutually admitted in evidence by the respective parties that the plaintiff had been paid the principal sum specified in the contract, for erecting such building. And the plaintiff proved that alterations of the character mentioned in the contract were in fact made, at the request of the defendants, and the amount properly allowable therefor, over and above all proper allowances to the defendants by way of deduction. It was proved on the part of the defendants, that on the 17th of February, 1838, a paper was executed by Butler, John Haviland, the superintendent or architect, and D. D. Williamson, the comptroller of the city, which, after referring to the agreement of the 11th May, 1835, for the erection of the building, and reciting its provisions, certified that the said Butler had nominated Thomas Thomas, and that the said superintendent had nominated Peter J. Bogert, appraisers to make the appraisement, and in the event of their disagreement, to appoint an umpire to decide between them, in pursuance of, and according to the true intent and meaning of the said articles of agreement. Bogert and Thomas took the oath faithfully and impartially to perform the duties of appraisers, on the 2d of March, 1838, and on the same day they mutually nominated and appointed Alexander Lawrence an umpire to decide between them in case of their disagreement; who accepted the appointment and took a similar oath of office. The defendants also gave in evidence an appraisement made in pursuance of the submission, in the following words:

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"New-York, April 23d, 1838.

"We the undersigned appraisers chosen to examine and value the extras and omissions caused by reason of alterations in the form and construction of the buildings called "The Halls of Justice," as provided for in the contract for said buildings, between Horace Butler and the mayor, aldermen and commonalty of the city of New-York, dated the 11th day of May, 1835, having carefully examined and valued the said extras and omissions, do hereby determine that the said Horace Butler *is entitled to receive* from the mayor, aldermen and commonalty of the city of New-York, the sum of twenty-three hundred and eighty-five $\frac{2}{3}$ dollars, for the increased cost of said building, *after he the said Horace Butler shall have filled up the outside paved ways.*

"Whereunto we have set our hands and seals on the day and date first written,

PETER J. BOGERT, [L. s.]

[L. s.]

ALEX'R LAWRENCE, [L. s.]"

The plaintiff, before the reading thereof to the jury, objected to the reception in evidence of this appraisement on the following grounds: *First*, That it was not the act of the umpire, but of the umpire and another person jointly. *Secondly*, That the appraisers first appointed, had no power to select and appoint an umpire until some disagreement had arisen between them. *Thirdly*, That the same did not purport to be an appraisement or ascertainment of the diminution or increase of cost consequent on alterations in the form, proportions, or construction of the building, determined upon by the architect or superintendent during the progress of the building or work specified in the contract, but purported to be an award, as upon a general submission to arbitration of differences between the parties. *Fourthly*, That the paper, whether regarded as an award or appraisement, was by reason of the words "after the said Horace Butler should have filled up the outside paved ways," irregular and void, as failing finally to determine the matter submitted. The superior court overruled the objection, and

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the terms of the order of reference, could not allow the amendments proposed; and the master disallowed them.

H. P. Barber, for the defendant.

EDWARDS, J. There are two questions presented for my decision. The first arises upon the motion to amend the order of reference to the master, and the second upon the exceptions to the master's report. Upon the first motion there was a question raised as to regularity. With the view that I have taken of the subject, it will not be necessary for me to consider that question.

The objection which is made to the order of reference is, that in that part of the order which refers to the framing of issues, upon the recriminatory part of the answer, the issues were directed to be made up for the purpose of determining whether the complainant was guilty of any of the adulteries imputed to him in the answer, "under such circumstances as would entitle the defendant, if innocent, to a divorce." By the law, as it stood before the revised statutes, both a condonation of the defendant's offence, and acts of adultery on the part of the complainant, operated as a bar to a suit for a divorce. But it would seem that the same effect was not given to a condonation of an act of adultery set up by way of recrimination, as when set up on the part of the complainant. (*Beebe v. Beebe*, 1 *Hagg. Eccl. Rep.* 795. *Wood v. Wood*, 2 *Paige*, 108, 111.) The reason assigned for this rule was, that the complainant was not *rectus in curia*; and being equally guilty with the defendant, he was not entitled to the assistance of the court. But in reference to the question which is presented to me, I am not permitted to base my opinion upon the general principles applicable to equity jurisdiction.

The law regulating divorces is now the subject of statutory enactment. And a condoned adultery of the complainant is not a defence, unless made so by the statute. Under the provisions of the revised statutes, in reference to this subject, although the fact of adultery be established, the court may de-

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ny a divorce, "when it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would entitle the defendant, if innocent, to a divorce." (2 R. S. 145, § 42, *sub.* 4.) The question then arises, what are the circumstances under which the defendant, if innocent, would be entitled to a divorce? The circumstances must be those which are mentioned in the previous sections of the statute; for they contain all the provisions upon this subject. By section 38, it is enacted that "divorces may be decreed, and marriages may be dissolved, 1. When both husband and wife were inhabitants of this state, at the time of the commission of the offence: 2. When the marriage has been solemnized, or has taken place, within this state, and the injured party, at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this state: 3. When the offence has been committed in this state, and the injured party at the time of exhibiting the bill of complaint is an actual inhabitant of this state." And by section 42, "although the fact of adultery be established, the court may deny a divorce in the following cases: 1. Where the offence shall appear to have been committed by the procurement or with the connivance of the complainant: 2. When the offence charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof, or by the voluntary cohabitation of the parties, with the knowledge of the fact: 3. When there shall have been no express forgiveness, and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offence charged: 4. When it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce." The first, second, and third subdivisions of section 38, and the first, second, and third subdivisions of section 42, contain all the provisions which are made by the statute, in reference to the circumstances which would entitle a party, if innocent, to a divorce. It was contended, on the argument, that subdivision 4, section 42, referred

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or annulled, the evidence given of the refusal of the defendants or their agents to appoint new appraisers, would not entitle the plaintiff to recover in this action ; but that the action of debt was not the proper remedy ; and 6. That Thomas Thomas was not the proper witness to show what claims, items or amounts were allowed or included in the appraisement, but that Bogert and Lawrence, who made the appraisement, should have been called for that purpose. On all which grounds the defendants moved for a nonsuit, or that the judge should charge the jury in conformity with the said points. That motion was denied ; and the cause being submitted to the jury they found a verdict for the plaintiff for \$25,000 debt, with six cents damages and six cents costs ; for which amount judgment was entered against the corporation ; and they brought their writ of error.

J. T. Brady & Willis Hall, for the plaintiffs in error.

F. W. Boardman & C. O'Connor, for the defendant in error.

STRONG, P. J. delivered the opinion of the court. It is objected by the defendant in error, that the selection of an umpire by the appraisers appointed by the parties was premature. If the question had not been settled adversely to this objection, I should have thought it entitled to great consideration. It was certainly intended by the parties that the appraisal should be made by the individuals selected by them, if possible, before requiring the interposition of another. They were bound, as I conceive, to make the attempt to agree. Had they done so without first calling in a third person, possibly they might have concurred. The umpire, sitting and acting with them from the beginning, may have prevented their agreement. Had the parties intended that there should be three appraisers at first, and that the judgment of any two of them should be binding, they would have said so in their original contract, and made the selection accordingly. However, the authorities are against the objection, and we are bound to overrule it.

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It is not a valid objection to the award that one of the appraisers signed it with the umpire. The authority of the appraisers originally appointed by the parties ceased upon their disagreement and selection of an umpire; but the signature of either was a mere nullity. It was still the act of the umpire. The case of *Soulsby v. Hodgson*, (3 Burr. Rep. 1474,) is in point, and settles the question. But although I concur with the court in that case, in the point decided by them, yet I by no means agree with them in the reason which they assign. I do not think that an umpire has a right to take what advice, or opinion or assessor he pleases.

The provision in the award, that the plaintiff below would be entitled to receive the sum awarded, after he should have filled up the outside paved ways, was intended as a condition. But the arbitrators had no power to impose it. It was simply void. If unperformed, it would not have prevented the recovery of the money. And as it could injure no one, it did not vitiate the award.

The operative part of the award differs, *in terms*, from the submission. By the contract, the appraisers were to determine the amount of the diminution or increase of the cost of the building caused by the alterations from the original design. The award is that Mr. Butler is entitled to receive the sum of \$2385,29 for the increased cost of the building. This was not saying, expressly, that the sum awarded was the actual amount of the increase of the cost caused by the alterations. But as the recital refers correctly to the contract, that raises a presumption that the award was in accordance with the submission. The inference however is not very strong, and is far from amounting to the *presumptio juris et de jure* which cannot be rebutted. It would not contradict the award to prove that the arbitrators thought that a considerable part of the amount of the increase of the cost caused by the alteration should be set off against some deficiency in other parts of the work, and that therefore the plaintiff below was not entitled to receive that part of such increase. Indeed it is apparent from the whole case that the umpire so thought, and acted accordingly.

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It is a general rule, that when the terms of a written instrument denoting the subject matter are equivocal, parol evidence may be admitted to apply them to a particular subject matter. (3 *Stark. on Ev.* 1021.) There is nothing in the objection that it does not appear from the award that the plaintiff below had notice of the time and place when and where the arbitrators met. A want of such notice may be proved, or it may appear expressly from the award; and then the objection would be fatal. But it does not appear in this case, nor is it to be presumed. The result is that there is not enough on the face of the award to show that it goes beyond the submission; neither is it sufficiently precise to shut out parol evidence that the umpire went beyond his authority.

The plaintiffs in error contend that the parol evidence to show that the umpire had exceeded his authority was improperly admitted by the court below. I have already stated one reason why I think that such evidence is admissible. The object was to show that the umpire had no jurisdiction, and that therefore his award was null and void. The subject matters referred to the appraisers were clearly and distinctly stated in the contract. And no extrinsic evidence as to them was admitted or offered. Clearly such evidence, if offered, would not have been admissible. It is unnecessary to determine whether, if the award had clearly described the matters decided, parol evidence would have been proper to contradict it in that particular. In this case the award was indefinite as to the subjects investigated and determined. If the arbitrators exceeded their authority, and thereby did injustice to the plaintiff, that is not apparent upon the face of the award, and can be proved by extrinsic evidence only. If that cannot be admitted, the injured party would be remediless. I know of no rule of law that would exclude it. But it is said that a court of law cannot vacate or set aside an award. True, but it is not necessary to annul an alleged award that never had any vitality. An award, if it may be so called, made by persons without authority, is a nullity; and may be so declared by any court before which an attempt is made to enforce it. Besides, the court for the cor-

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rection of errors, when this case was before that tribunal,(a) expressly decided that the evidence in question was competent, and I cannot see why the question was again raised in the subsequent trial in the court below.

It has been contended by the plaintiff in error that Thomas was an incompetent witness, inasmuch as his testimony would go to impeach the award, and because, even if the testimony of an arbitrator was admissible, his was not the best evidence which could have been adduced. It is well settled that the evidence of an arbitrator cannot be received to impeach his own award. But the witness never made the award in question. It was not his, but was made in opposition to his own opinion. After the final disagreement between him and his associate, preceded as it was by the selection of an umpire, his power ceased. He was no longer an arbitrator. Besides, the evidence of arbitrators has often been admitted to show that they did or did not take into consideration any particular subject matter. That would not be an impeachment of the award, within the principle, unless *mala fides* should be alleged. The other objection to his competency was equally untenable. He had as good opportunities for knowing, and did know, as much of the matter concerning which he testified, as any other man. He testified that he acted as clerk, and kept the account of the items considered and allowed by the appraisers; that the account kept by him was made up, and a balance struck; that the amount was the same for which the appraisement was made, and that at the last meeting which he attended, the other two appraisers agreed upon this sum, and nothing remained to be done but to have the award written and signed.

The witness proved very clearly that the umpire included in the award matters which had not been submitted by the parties. The submission related exclusively to the cost which might be caused by the alteration from the original design. But the umpire made allowances by way of deduction against Mr. Butler for workmanship and materials, alleged to be defec-

(a) 7 Hill, 329, S. C.

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tive in those parts of the building which had not been altered from the form, proportion or construction provided by the original plans and specifications, and which had not been in any manner affected by the alterations actually made. These matters had not been referred to him; and the allowance was the more improper, as all except what related to the alterations had been settled and paid for.

But it is said that the good may be separated from the bad, that the amount of the items properly allowable can here be ascertained from the account kept by the witness Thomas, and that such amount should control the recovery. But the answer to that is that there has not been any formal adjudication as to the amount properly allowable under those items. The account contains a mere estimate. Neither party could make use of it by way of charge or discharge. It was not conclusive evidence of the amount due.

It was contended in behalf of the defendants below, that if the award was void, the appointment of the appraisers remained valid, and that the plaintiff had no right to annul the powers conferred upon them, or to call for the selection of others. An appointment originally good, may become void by subsequent events. Had one of the arbitrators, after the selection, and before making the award, become deranged, or interested in the subject matters of the claim, either event would have rendered him incompetent, and virtually annulled his appointment. The agreement between these parties expressly provided that the amount should be settled by *impartial* appraisers. If either party had selected one known by such party to have formed an opinion favorable to his interest, it would have vitiated the award. The other party would not have been bound by it. In this case the appraisers were doubtless impartial when originally appointed. But they had subsequently formed an opinion, and expressed it in a solemn manner. They would naturally strongly incline to such opinion on any future investigation. They could not be the impartial men to which both parties are entitled. As jurors, they would certainly have been disqualified. The same rule should apply

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to arbitrators; more especially as their award is of more binding effect than the verdict of a jury. The plaintiff was, therefore, under the circumstances, justified in considering the first selection as virtually annulled, and in calling for a new appointment; and the defendants should have yielded to his request. But the defendants not only refused to make any new appointment, but virtually refused to renew the investigation before the same arbitrators, by insisting that the appraisal already made was valid, and that it should control the extent of the claim. Their agent, at the time appointed by the plaintiff for the proposed new selection, tendered to him the amount which the appraisers had adjudged to him, and expressly avowed that he had nothing further to say on the subject.

If the award was null and void, and the appraisers and umpire had become virtually incompetent to act, the rights of the parties remained the same as if there had been no appointment or appraiser at all. The application made by the plaintiff to the defendants below, to meet and make a new appointment of appraisers on the 10th of May, 1838, was virtually refused, and, as it appears to me, without any sufficient reason. The question then occurs whether the refusal can prevent the recovery by the plaintiff of money justly due to him. It ought not to have that effect. It certainly cannot be seriously contended that a debtor can, by refusing to arbitrate as to the amount due pursuant to a contract, forever prevent his creditor from recovering a just demand. If the appraisal is a condition precedent and is of so rigid and unbending a character that it must be performed before payment can be enforced, a refusal to arbitrate by the corporation would be a perpetual bar. It is well settled that a court of equity cannot compel a specific performance of an agreement to arbitrate. (6 Ves. 818.) If an attempt should be made to recover the value of the work, in any shape, at law or in equity, it could be met with the answer which the defendants now make, that the value of the work cannot be assessed in any manner except that provided by the parties. I conceive, however, that no party can insist upon a condition precedent when its non-performance has been caused by himself. Such

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non-performance would not prevent the vesting of an estate; nor can it prevent the accruing of a right, or its enforcement by an action. It in effect amounts to a waiver. That there may be an effectual waiver by parol, of a condition specified in a written, or even a sealed, contract, there can be no doubt. (*Fleming v. Gilbert*, 3 *John. Rep.* 528, and the cases there cited.) In the principal case, Judge Thompson, in giving the opinion of the court, said, "It is a sound principle that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned." The contract between the parties was substantially that the plaintiff should make such alteration in the form, proportion or construction as described in the specification, as should be authorized by the superintendent or architect, in writing; and that he should deduct from the contract price for any diminution, or receive in addition thereto any increase, of the cost which might be effected by such alteration; and that if he and the superintendent or architect, did not agree upon the amount, that should be determined by impartial appraisers, one to be chosen by each party, or, in case of their disagreement, by an umpire to be chosen by the appraisers. The plaintiff below alleges that such alterations were made pursuant to the required authority; that they increased the cost; that he and the superintendent or architect did not agree upon the amount; that there had been an actual submission to arbitration which had proved ineffectual; that he had subsequently offered to appoint an appraiser on his part, and requested the defendants below to appoint another, which they had refused to do; and that such increase of cost amounts to a specified sum, which he claims to recover. It was proved that alterations such as were referred to in the contract were in fact made, and the amount of the increase of cost, after all proper deductions, was also established. And also the offer to the defendants, and a refusal, in effect, by them, to arbitrate as to such amount. It was contended by the counsel for the defendants, that there was no proof, on the trial, that the alterations had been authorized by the requisite writing. The bill of exceptions states that the plaintiff below gave evidence that the extra work was

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done, and the extra materials were furnished, at the request of the defendants below. The inference certainly is that the request was made in due form. Besides, the corporation admitted that by selecting appraisers, in the first instance, to value the extra work and materials; and by the neglect to raise the objection on the trial, which, had it been raised, could probably have been removed by producing the required evidence, they had waived the objection; and it is too late to raise it on a writ of error.

The performance of the extra work, pursuant to the contract, gave to the plaintiff a valid claim against the defendants for the increased cost. The amount only was to be settled by arbitration. That was for the mutual benefit of the parties, and might be waived by them. If waived, by both parties, as I think it eventually was, the plaintiff below might sustain his action, in the same manner as if the clause providing for such arbitration had not been inserted in the contract. I do not go any further than that: nor is it necessary that I should do so. I do not mean to say that the mere performance of the work itself, gave the plaintiff a right of action for what it was worth. But I am clear, that as there had been an actual reference which had proved ineffectual, and a subsequent proposal by the plaintiff to refer, and a refusal by the defendants, the right of action has fully attached. (*2 Atk. Rep.* 585. *2 Bro. Ch. Rep.* 336.)

It has also been contended on the part of the plaintiffs in error, that, supposing that the defendant in error had, under the circumstances, a valid claim against them, he could not recover it in an action of debt. The ground of the objection is that the amount was unsettled. There could not well be any other to the form of the action; as debt can clearly be maintained for the value of work performed under a contract, whether sealed or unsealed, or whether written or verbal. The distinction is between a claim for the actual value of the work, and one where the plaintiff seeks to recover unliquidated special damages for the breach of a contract. The former is a debt, the latter is not, until settled by a judgment. The action

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of debt can, in general, be sustained for money due on a contract, wherever the demand is capable of being readily reduced to a sum certain, upon the predicated statement of facts. It matters not whether every part of the alleged claim is established on the trial or not; as it is now settled that the plaintiff may, in this form of action, recover less than the sum stated in his declaration to be due. There is nothing stated in the declaration, nor is there any thing in the evidence, to show that the demand of the plaintiff below is incapable of being reduced to a sum certain.

The judgment of the court below must be affirmed, with single costs.

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NEW-YORK GENERAL TERM, November, 1847. *Hurlbut,*
McCoun, and Mason, Justices.

In the matter of PRIME and others.

Upon a writ of *habeas corpus* the court cannot look beyond the colorable authority of the judge who issued the warrant on which the defendant was imprisoned. It cannot inquire into the technicalities, nor the strict regularity, of the proceedings before that officer.

The writ of *habeas corpus* is not intended to review the regularity of the proceedings, in any case, but rather to restore to his liberty the citizen, who is imprisoned without color of law.

Upon a writ of *habeas corpus* the court will merely look into the sheriff's return containing the warrant by virtue of which he detains the relator, and into the affidavits upon which the warrant was issued, so far as to see that the officer issuing the warrant had colorable jurisdiction.

And if the court finds that the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question; nor undertake to say whether he erred in adjudging the proof to be sufficient.

If the court finds that the warrant under which the relator is imprisoned is *prima facie* sufficient to justify the imprisonment, and if, on looking beyond the warrant, and examining the affidavit upon which the same was issued, it is satisfied that there was at least colorable proof before the officer issuing the warrant, on

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which he might exercise his judgment in awarding the process, that is as far as the court will go, upon a writ of *habeas corpus*. And where these facts appear, it will not discharge the person imprisoned.

The general provisions of the *habeas corpus* act show that it was not intended as a writ of review, to correct the errors of inferior tribunals.

It seems that nothing is properly before the court, upon the return of a *habeas corpus*, except the warrant, on which the relator is imprisoned. If that is regular on its face, and if the sheriff would be protected in an action of trespass, it is sufficient; and the relator cannot be discharged. *Per HURLBUT, J.*

ON *habeas corpus* to discharge Edward Prime, John Ward, and Samuel Ward, from the custody of the sheriff of the city and county of New-York. The sheriff returned that he held the defendants in his custody, and under his restraint, under and by virtue of the several warrants, copies of which were annexed to his return. Of those warrants, two were issued by the Hon. John W. Edmonds, one of the judges of this court—one upon the application of the Jefferson County Bank, (a) and the other on the application of the Bank of Commerce, in New-York—and three were issued by the Hon. T. J. Oakley, chief justice of the superior court of the city of New-York, upon the applications of other creditors of the defendants. These warrants, which were all in nearly the same form, were issued under the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831. (*Laws of 1831, p. 396.*) Each warrant recited that whereas it satisfactorily appeared to the judge, by affidavits, copies of which were annexed to the warrant, that the applicant had recovered a judgment in a court of record for an amount exceeding fifty dollars, and for which the defendants could not be arrested or imprisoned, according to the provisions of the act to abolish imprisonment for debt; and that they had rights in action which they unjustly refused to apply to the payment of such judgment. And the warrants commanded the sheriff to arrest the defendants and bring them before the officer issuing the same, to abide such further order as might be made in the premises.

The affidavits upon which the applications for these several

(a) See Judge Edmonds' opinion, on that application, ante, p. 296.

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warrants were made, set forth the recovery of the judgments, and the amounts due thereon respectively; and stated that the defendants were the owners of rights in action, money, and evidences of debt, which they unjustly refused to apply to the payment of the said judgments, and particularly that they had admitted they were possessed of certain demands or rights in action against sundry persons mentioned in such affidavits. It appeared from some of the affidavits that the defendants, when thus applied to and requested to apply their assets to the payment of the judgments, replied "we are insolvent, and unable to pay our debts in full. We are unwilling to make any preferences among our creditors, but we are willing to give you your full share of our assets, or to make an assignment of all our property for the equal benefit of all our creditors."

The defendants severally traversed the returns of the sheriff, on oath; insisting that the warrants were issued by the several judges or officers issuing the same, without the said judges or officers, or any of them, having acquired jurisdiction to issue the same under the act to abolish imprisonment for debt; and that the affidavits upon which such warrants were founded, were insufficient in law to justify the issuing thereof. Wherefore they averred that their said imprisonment and detention was unlawful, and that they were entitled to their discharge thereupon.

N. Bowditch Blunt, for the defendants. I. The act under which the several warrants issued is unconstitutional and void, 1. The act is in contravention of the 1st and 2d sections of article 7 of the constitution of 1821. Being passed under that constitution, it must stand or fall under the same. 2. It deprives the citizen of rights and privileges secured to him by the constitution, and is in violation of the letter and spirit of article 7, § 1, of the constitution of 1821, and article 1, § 1, of the constitution of 1847. 3. It deprives him of the right of trial by jury in cases in which it has heretofore been used; in contravention of the 2d section of article 7, of the constitution of 1821, and of article 1, § 2, of the present. 4. It creates a new court,

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or tribunal, of final judgment, with a right to proceed contrary to the course of the common law ; in violation of the last clause of § 2, article 7, of the constitution of 1821, and of article 6, § 10, of the present. 5. It inflicts a cruel and unusual punishment in violation of the bill of rights, of the 8th article of amendments to the constitution of the United States, of 1 *R. S. p. 94*, § 17, and of the 5th section of the present state constitution.

II. The term "by the law of the land," means a trial had according to the course of the common law—that is, a judgment by his peers. (*Taylor v. Porter*, 4 *Hill*, 140. 2 *Just.* 45, 50. *Hoke v. Henderson*, 4 *Dev.* 1, 15. 2 *Kent's Com.* 5th ed. p. 13, and note b. 3 *Story on Const.* 661. *In the matter of John and Cherry-st.*, 19 *Wend.* 696. *Magna Charta*, ch. 29.) This proceeding is also contrary to the spirit and meaning of the phrase "due process of law," as used in article 7, § 7, of the constitution of 1821, and article 1, § 6, of the present constitution.

III. The right of trial by jury applies to all cases in which the right existed prior to the adoption of the constitution of 1777. (2 *Kent's Com.* 5th ed. 13. *Murphy v. The People*, 2 *Cowen*, 815. *Also per Walworth, Ch., note b.* 2 *Cowen*, 819. *Barker v. The People*, 3 *Cowen*, 686.) It is presumed not a case can be found in which a trial for fraud was had, without a jury, prior to the passage of the act of 1831, except in cases in equity. Cases of reference, contempts, the exercise of a summary jurisdiction by courts in relation to their officers, &c. are all based upon the ancient and established jurisdiction of the courts, and the modes of trial as regulated by the common law under magna charta. (*Lewis v. Garrett*, 5 *How. Miss. Rep.* 434. *R. M. Charl. Rep.* 302. *Lee v. Tillotson*, 24 *Wend.* 337. *Duffy v. The People*, 1 *Hill*, 355.) Such also are disciplinary proceedings, proceedings to prevent the commission of crimes, assessment of damages of the owners of property taken for public use. (*In the matter of Newell Smith*, 10 *Wend.* 456. *The People v. Duffy*, 1 *Hill*, 355. *Livingston v. The Mayor, &c.* 8 *Wend.* 85. *Beekman v. The Saratoga*

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R. R. Co., 3 *Paige*, 45.) Our own statute (2 *R. S.* 72, § 4,) makes the question of fraudulent intent in the disposition of goods, a question of fact for the jury. (*Cunningham v. Freeborn*, 11 *Wend.* 251. *Smith v. Acker*, 23 *Id.* 653.)

IV. The power conferred under the act of 1831, amounts to the creation of new tribunals, in violation of the constitution. 1. The provision of the constitution refers to courts exercising the usual jurisdiction of courts, but proceeding by modes unknown to the common law. (*Per Curiam*, *In the matter of Smith*, 10 *Wend.* 457.) 2. It applies to cases of trials of issues of fact in civil and criminal proceedings. 3. The mode of proceedings under this act amounts to a trial as for an offence, with a view to punishment; especially that part relating to "fraudulent disposition of property." (*Townsend v. Morrell*, 10 *Wend.* 577.) In this case, Chief Justice Savage, commenting upon this same act, says, "The imprisonment, if it actually takes place, is severe; it is to be in the same manner as imprisonment upon criminal process. It is then intended as a punishment." (*Id.* 581, 582.) 4. The constitution, in this particular, is substantially a transcript of the statute passed in the reign of Charles I. to destroy the courts of star chamber and high commission. (4 *Stat. at Large*, 816, § 5. *Dwar. on Stat. part 2*, pp. 294, 809.) 5. The erection of new tribunals for the decision of facts without the intervention of a jury, and the introduction of new and arbitrary methods of trial, should always be regarded with jealous circumspection. (3 *Black. Com.* 380, 381. 3 *Hamilton's Works*, 259. 3 *Dallas*, 388.)

V. The law inflicts a cruel and unusual punishment. Particular punishments, in certain cases, encroach upon rules and rights established by the constitution. (3 *Coven*, 706.) Such are punishments entirely disproportioned in magnitude to the offence of which the accused is guilty. The effect of conviction under certain sections of the act in question, is perpetual imprisonment. (10 *Wend.* 582. *Laws of 1831*, p. 396, § 4, *sub. 3*. *Sess. Laws of 1837*, p. 466.) And that, too, in the same manner as upon criminal process, and without relief, except by

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the repeal of the act. Any punishment operating as an infringement of some rule expressly established, or some right expressly reserved, is unconstitutional. (*Per Chancellor, Barker v. The People*, 3 Cowen, 706.)

VI. Assuming the law to be constitutional, the several affidavits upon which the warrants issued were insufficient to confer jurisdiction. 1. This is a summary proceeding unknown to the common law—the mere creature of the statute—and every fact necessary to confer jurisdiction must be affirmatively shown. (*Dakin v. Hudson*, 6 Cowen, 221.) 2. The affidavit of the creditor must make out a plain case. Facts must be stated; not conclusions. (*The People v. Recorder of Albany*, 6 Hill, 429.) 3. Every intendment must be made in favor of the debtor; it being a question of personal liberty. (*Dwar. on Stat. p.* 770, 749, 750. 4 *Bing.* 183.)

VII. The affidavits are defective in the several particulars mentioned. 1. The first affidavit is defective, in not setting forth the nature of the contract. This is requisite, in order that the court may determine upon the fact, whether the case comes within the provisions of the act. (*Dwar.* 661. *Sheers v. Parker*, 1 *T. R.* 141. *Rex v. Dukes*, 8 *id.* 542. *Rex v. Stone*, 1 *East*, 644. 6 *Hill*, 429.) 2. The first affidavit is further defective in not stating and setting forth the answer of the defendants to the alleged demand of the complainants; so that the officer might determine judicially whether it amounted in law, to an unjust refusal to apply. It will not do to swear that the party unjustly refused. Every refusal is not necessarily unjust; and the complainant is bound to set forth the answer to the demand, so that the officer may determine whether or not the refusal was unjust. 3. The second affidavit contains the answer of the defendants to the demand; and we insist that answer was not an unjust refusal to apply. (*Per Chancellor, Spear v. Wardell*, 2 *Barb. Ch. Rep.* 291.) 4. The third affidavit is defective in swearing to a conclusion of law, without giving the facts upon which such conclusion is formed. 5. The fourth affidavit is also defective in the same particular; and is uncertain and informal in other respects, 6. The fifth

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affidavit does not even swear to the conclusion of law. The complainant swears to a refusal, but does not undertake to swear that the refusal was unjust.

VIII. The rule of pleading upon statutes containing exceptions in the enacting part, is to negative the exception. (*See cases above cited.*) And the same rule applies to the evidence.

IX. The petitioners are therefore entitled to be discharged.

Geo. C. Sherman, for the Jefferson County Bank. I. By the sheriff's return to the writs it appears that the relators are in his custody under a warrant issued on behalf of the Jefferson County Bank, being legal process, fair upon its face; the recitals contained in which are sufficient to confer jurisdiction, or if not conclusive, they are prima facie sufficient. (12 *Wend.* 102. 1 *Hill*, 154. 25 *Wend.* 483. 11 *John.* 224. 2 *Cowen & Hill's Notes to Phil. Ev.* 1016, 1017. *Id.* 993, 994. *Cave v. Mountain*, 1 *Mann. & Grang. Rep.* 275. *Ex parte Watkins*, 3 *Pet.* 193, 203. *Stoner v. State of Missouri*, 4 *Miss. Rep.* 614.) Error, irregularity, or want of form is not available. (*People v. Morris*, 1 *Hill*, 154. *Ex parte Kearney*, 7 *Wheat.* 38. *Ross' case*, 2 *Pick.* 165. *Riley's case*, *Id.* 172. *Ex parte Kellogg*, 6 *Verm. Rep.* 509.) If the return shows that the party is in custody under legal process fair upon its face, it is prima facie sufficient; and can only be impeached by the party who seeks relief from imprisonment thereon, by showing affirmatively a want of jurisdiction. (*See authorities above cited.*)

II. The relators cannot set up defects or irregularities in the evidence upon which the warrant was issued; but they must, on oath, distinctly set up the fact which exempts them from the jurisdiction of the officer—nor can they advert in this case to the evidence at all. (*Habeas Corpus act*, 2 *R. S.* 562, § 50. 2 *Cowen & Hill's Notes to Phil. Ev.* 1016, 1017. 1 *Hill*, 154. *People v. McLeod*, 3 *Hill*, 377, and note to the case, and the authorities there cited.) The matter set up by the relators to avoid the return, does not authorize them to bring up the evidence produced before the judge issuing the warrant. If they

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desire to bring up the record on the return of the habeas corpus, they should sue out a certiorari to the judge to bring up the record. But this they cannot do, unless they are in custody on final process; and then a habeas corpus, aided by certiorari, will bring up the record and enable them to review the whole case.

III. The affidavits comply with the act, and confer jurisdiction upon the officer issuing the warrant. (*See Sess. Laws of 1831, p. 896, §§ 1, 2, 3, 4, 5.*) The affidavits do distinctly state the amount and nature of the demand; and we are not called upon to state the consideration.

IV. The question here raised may be regarded as *res adjudicata*. (*See Brittain v. Kinnard, 1 Brod. & Bing. 432; S. C. 4 Moore, 5, and cases there cited; 2 Cowen & Hill's Notes, 1016, 1017, and cases there referred to.*) When the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision has been holden conclusive. By stipulation of the relators' counsel it is admitted that after arrest the relators were brought before the judge, and these objections to the form of the affidavit were raised and argued on both sides, and adjudged not well taken; the judge holding the affidavits sufficient to enforce jurisdiction.

V. The refusal of the relators to apply their property as requested was unjust; inasmuch as the prosecuting creditors are entitled to a preference. It was evidently the design of the act to afford the vigilant creditor the precedence.

VI. The act is constitutional. The proceeding authorized by it is a civil proceeding; it is not an original proceeding, but is in aid of the creditor who has commenced a suit, or recovered a judgment, or decree. And the proceeding, though summary, is not designed to inflict punishment, but to give the creditor a right to imprison his fraudulent debtor for debt; in a similar manner as he could have done previous to the passage of the act of 1831.

B. D. Silliman, for the Bank of Commerce. The Bank of Commerce having recovered a judgment in this court against

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the defendants, applied for and obtained a warrant according to the provisions of the act to abolish imprisonment for debt, &c. A similar warrant had been previously applied for, and obtained, by the Jefferson County Bank. Before any proceedings had been had on the Bank of Commerce warrant, except the arrest of the defendants, the defendants applied to this court for a habeas corpus; stating in their petition that they were wrongfully imprisoned on the warrant of the Jefferson County Bank, and charging that the proceedings in respect to the last named warrant were illegal and void—but making no such charge as to the warrant of the Bank of Commerce, and making no allusion to the last named warrant.

The Bank of Commerce has received notice of the habeas corpus, thus issued; and on its behalf I insist, I. That the court ought not, in this proceeding, to pass upon and decide as to the regularity of the proceedings of the Bank of Commerce. The court should decide only on the case in which the warrant is alleged by the petition to be illegal, viz. that of the Jefferson County Bank. (2 R. S. 467, § 27, *sub.* 3, 4, 5.) The return to the habeas corpus refers only to the authority under which the particular detention complained of as illegal exists. (2 R. S. 468, § 34.) The notice which is required to be given to parties "having an interest in the continuance of the imprisonment," refers only to parties who have an interest in continuing the imprisonment on the particular charge complained of, and alleged to be wrongful. (2 R. S. 471, § 48.) The Bank of Commerce have no interest in the proceedings under the warrant of the Jefferson County Bank.

II. But if the court hold that the case of the Bank of Commerce is to be decided under this habeas corpus, then we claim that our proceedings are regular and sufficient. 1. The affidavit is sufficient if it allege an unjust refusal, without setting forth any conversations. 2. The provisions of the act to abolish imprisonment for debt are a substitute for the former *ca. sa.*, and the plaintiffs are entitled to the warrant when they show, (1) a judgment; (2) that defendant has rights in action; (3) a demand and refusal to apply them.

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By the Court, MASON, J. The court, or a majority of the judges, are decidedly of opinion, that in this case we cannot review the regularity of the proceedings had before his honor Judge Edmonds; and that upon the writ of habeas corpus we cannot look beyond the colorable authority of the judge to issue the warrants. We cannot inquire into the technicalities, or the strict regularity of the proceedings. This writ is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law. In these cases we can merely look into the sheriff's return, which contains the several warrants by virtue of which he detains the relators; and also into the affidavits contained in the traverse and upon which the judge issued the warrants, so far as to see that the judge had colorable jurisdiction. Or, in other words, if we find that the judge had jurisdiction of the process, and assumed to take proof upon the issuing of the same, and which proof he adjudged to be sufficient, we will not, upon the writ of habeas corpus, review his adjudication upon that question; nor undertake to say whether he erred in adjudging the proof to be sufficient. In looking into the warrants under which the present relators are imprisoned, we find them regular upon their face, and *prima facie* sufficient to justify the imprisonment; and when we come to look beyond the warrants, and examine the affidavits upon which they were issued, we are satisfied that at least there was colorable proof, in these cases, before the judge, upon which he might exercise his judgment in awarding the process. And this is as far as we intend to go in these cases.

We cannot but remark that the 50th section of the habeas corpus act, under which the relators claim to traverse and review the whole merits of these cases, is very loosely drawn; and, taking the very letter of the statute, it might seem to admit of a broader inquiry; but on looking into the notes of the revisers, and their reasons for reporting this section, we see they cite the case of *United States v. Jenkins*, (18 John. Rep. 305,) where it was doubted whether the return of the officer could be traversed at all. And in the case of *The People v. McLeod*,

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(1 *Hill's Rep.* 377,) the late Mr. Justice Cowen declares this to be the reason of the amendment. And the late Reporter Hill, in a very elaborate note to the review of the case of *McLeod*, (3 *Hill's Rep.* 634,) shows, in my opinion, the design and scope of this 50th section; and after reviewing all of the cases, he comes to the same conclusion which we have adopted in this case. And it seems to me that all of the objects of this 50th section, and of the writ of habeas corpus itself, will be accomplished by giving the statute this construction. The best guide in construing the statute undoubtedly is, to ascertain what the law was before, and what was the evil intended to be remedied by the amendment. It was said in the case above cited in 18 *Johnson's Reports*, and which is the only reason assigned by the revisers for reporting the amendment to this section, that the officer's return could not be controverted. But what does the officer return? Nothing more than that he detains the relators by virtue of certain warrants of which he annexes certified copies to his return. The strict traverse of the return would be to deny and controvert the fact that the sheriff does detain by such process as he returns, and that the same is valid, or good upon its face. But I prefer not to give the statute so strict a construction. Again; the general provisions of this habeas corpus act show most clearly that it was never intended as a writ of review to correct the errors of inferior tribunals. It has none of the guards which are usually thrown around such writs. This is a writ of right which every citizen can demand of the court, and the refusal of which is attended with severe penalties upon the court or officer that refuses it. And its design is to liberate, in a very summary way, every citizen who shall be deprived of his liberty without color of law. To this end the act is most remarkably well guarded; and if confined to its original purpose, is worth all the efforts and struggles it cost our ancestors to obtain it.

In these cases, as the warrants upon their face appear to be valid; and as the judge, to say the least, had colorable jurisdiction and authority to issue them, the relators must be remanded to the custody of the sheriff.

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McCoun, J. I am compelled to dissent from the opinion just expressed by my brother Mason, and which is the opinion of a majority of the bench. I agree with my brethren, that upon a writ of habeas corpus, where the officer returns the warrant upon which he holds the party, if the warrant is good upon its face, that is all that can be inquired into, provided it is issued from a court of *general jurisdiction*. If, however, the writ is issued by a court having a special jurisdiction conferred by statute, then it is legitimate for us, under a writ of habeas corpus, to inquire whether the officer had the case properly within his jurisdiction, so as to exercise rightfully the power vested in him by statute. Such is the case before us upon this writ, and I am of opinion that we are obliged here to look into the affidavits upon which the judge acted. I think these papers properly before the court. The case of *Ex parte Randolph*, (9 *Peters' Rep.* 12, *note a*,) was a case where Lieut. Randolph was brought before a court on a writ of habeas corpus. He had been arrested for not paying over certain moneys alleged to have been collected by him, and payable to the treasury department. The court, in that case, looked into all the proceedings before the court below, for the purpose of seeing whether Randolph was properly subject to its jurisdiction; and they decided that he was not such an officer of government as to be subject to such a summary process, and the prisoner was discharged. I mention this case, for the purpose of confirming the position I have assumed, that when a judge acts in a summary proceeding, under a special power, the court before whom the habeas corpus is, can look into the affidavits. This brings us to the affidavits upon which these proceedings were founded. The affidavits are explicit enough as to the nature of the demand, and they also show that the parties were in possession of certain assets of their firm, choses in action, &c. to the amount of about \$40,000; that these creditors made a demand of the defendants, that they should apply these assets in payment of their demand, and that the defendants unjustly refused. As these assets could not be reached by a *fi. fa.*, they very properly come under the head of intangible property. This is what

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the affidavits made out as matters of fact. In my judgment, however, it is not a mere refusal which will authorize a judge to issue the warrant. It must be an "unjust refusal;" and whether the refusal is unjust or not, is a matter of law, to be determined from the facts which appear in the affidavits. I am at a loss to perceive how, in this case, there was an unjust refusal. The reply of the defendants, as appears from one affidavit, is, we are insolvent, and we are willing to apply all our property to the payment of our debts pro rata; that they did not want to prefer one creditor over another, and expressed their willingness to make an assignment. And yet, in this case, the magistrate felt authorized to issue a warrant, which could only be grounded upon an unjust refusal. The affidavits do not show any facts whatever, which can warrant such an inference. The mere statement, in the affidavit, that the refusal was unjust, amounts to nothing; as it is a mere conclusion of law, and not a proper subject of an affidavit. My brethren, however, contend that this expression, as it appears in the affidavit, gives a colorable authority to the judge to issue the warrant, and that behind this, we have no right to look. (b) If this case were before me upon the hearing, I should require some more facts to satisfy me that these parties have been guilty of fraud, such as amounts to an unjust refusal; and they will be at liberty to urge this ground before the judge. This statute, commonly called the Stilwell act, is one which undertakes to give a remedy in cases of fraud on the part of debtors, either in the original contracting of the debt, or in subsequently attempting to remove their property. Where these circumstances of fraud do not exist, we have other means by which to reach intangible property, viz. by creditors' bills. This is a proceeding, likewise, which will reach property attempted to be

(b) In the case of *The British Prisoners*, (1 Wood. & Minot's Rep. 66,) which was an application under the treaty with Great Britain, for the surrender of fugitives from justice, the objection was raised upon *habeas corpus*, that the inquiry into the conduct of the prisoners, preliminary to their commitment, was not had by a competent officer. And the court said they had no doubt it was proper for them to look behind the warrant, so far as to see that it was issued in a proper case, and by a competent officer.

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disposed of fraudulently ; so that this remedy may be resorted to not only in cases where there is no fraud, but in some cases where fraud exists. The Stilwell act was not intended to supersede the jurisdiction of the court of chancery. It was only intended to be applied to cases of actual fraud. In 1840, a law was passed extending the time within which execution might issue, to thirty days after the rendition of the judgment. And in addition to this, the sheriff has sixty days from the issuing of the *fi. fa.* before he is compelled to make his return. These are all an extension of credit, and an indulgence shown to the debtor, and abundantly prove that in all cases where he is honestly disposed, the law favors him. And it cannot be presumed that the statute commonly called the Stilwell act, was intended to authorize proceedings against all judgment debtors, when they may refuse to turn out their property in compliance with a demand of a creditor. They may have good reasons for so doing. This remedy, I repeat, is only for the cases where the creditor has committed, or contemplates, a fraud. It is a remedy involving severe proceedings, and cannot be considered as of general application.

And what sort of an application is the debtor to make ? The statute does not say that he shall turn out his notes, &c. Shall he make an assignment ? He is to apply them in payment. If they consist of outstanding claims, how can he apply them ? In relation to such, I think it would be right for him to say, I will apply them when I have collected them. It is unnecessary however, for me to go further with this subject. In *The People v. Recorder of Albany*, (6 *Hill*, 429,) Mr. Justice Bronson states the true ground. In this case, it is not pretended that these defendants concealed their property : nor are they charged with the commission of any unjust act, save the mere refusal. And in my opinion, the allegations of the affidavits on which the warrant was issued were insufficient to justify the proceeding ; and the parties should be discharged.

MASON, J. The refusal of the defendants is not a criminal act, by the terms of the statute. My opinion is, that we can—
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not look behind the colorable nature of the proceeding. It is not within the province of a habeas corpus to look into the character of the facts, beyond those sufficient to give colorable authority.

HURLBUT, P. J. I myself doubt whether any thing is properly before the court, upon this proceeding, except the warrant itself. If that is regular on its face, and if the sheriff would be protected in an action of trespass, it is sufficient; and we cannot discharge the prisoners. But my brethren differing with me, in this view of the subject, I joined them in going back and looking into the affidavits. In the case of the Jefferson County Bank, it is alleged that there were not sufficient facts to authorize an inference of an unjust refusal. No member of this court intends deciding that there has been a fraudulent, or even an unjust refusal. Our simple object is to determine what are the functions of a writ of habeas corpus. I find here that certain facts were adduced before the officer, from which he inferred an unjust refusal. If he erred, it was a *judicial* error, and cannot be reviewed on a writ of habeas corpus. Whether he erred or not, is not for us now to say. We cannot entertain a writ of habeas corpus to review errors of judgment, where there is colorable proof to authorize the process. That can only be done by a writ of certiorari.

McCOUN, J. I consider this a *void* process, and it can be reviewed for that reason.

Order remanding relators to the custody of the sheriff.

SAME TERM. *Before the same Justices.*

CORLIES vs. WADDELL.

Recognizances in criminal cases should not be made returnable before a judge, at chambers; and if made returnable in that manner, the prisoner is not bound to appear there.

They should be made returnable before the court, at a term thereof.

A marshal of the United States bears the same relation to the circuit court of the United States that a sheriff does to the county courts in this state; and his duties are very analogous to those of a sheriff.

A marshal has no right to receive money upon an estreated recognizance in a criminal case, until an execution has been duly issued and placed in his hands.

And if a surety in a recognizance of that nature, after having waived the issuing of an execution, pays to the marshal the amount due upon such recognizance, he may sue the marshal, while the money is still in his hands, in an action for money had and received, and recover the same back.

ERROR from the superior court of the city of New-York. In April, 1838, James Bottomley was arrested on a warrant issued by S. Rapelje, an officer of the United States government, (a commissioner,) for smuggling and perjury. The prisoner was taken before that officer, and entered into recognizances to appear at the chambers of Judge Betts on the 24th of April. On the return day of the recognizances, Bottomley did not appear; and his recognizances were subsequently estreated, by the circuit court, and an entry made on the minutes of the court, ordering execution to issue. Corlies, the plaintiff, was the surety in the recognizances. He told Rapelje, the marshal, that there was no necessity for issuing execution, but that he would pay the money whenever it was called for. Accordingly, no execution was issued. Rapelje afterwards called on Corlies for the money, who delivered to him \$4000, to be paid to Waddell, then United States marshal, to be applied to the discharge of the recognizances. Subsequently, however, and while the money was in Waddell's hands, Corlies changed his mind, and gave him notice not to pay the money over, and thereupon brought his action, in the superior court, to recover the amount, as money had and received. In that court a verdict was rendered for the defendant; the court holding that the defendant

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had the power to receive the money either as the marshal of the United States, or as being considered a disbursing officer of the United States; and that his receipt was a satisfaction of the recognizances.

Jonathan Miller, for the plaintiff. I. The recognizances were void *ab initio*. Sylvanus Rapelje was not a commissioner authorized to take them. His authority was derived exclusively from the 104th rule of the circuit court, and extended only to the taking of bail in civil cases. The circuit court gave a construction to the 104th rule in *Hornbeck's case*. (See *MS. certificate of Hon. S. R. Betts, Dist. Judge*.) In which case it decided that an affidavit sworn to in a criminal proceeding before a commissioner *ex officio* under that rule was not perjury, on the ground that a commissioner under that rule had no legal authority to administer oaths in criminal proceedings: and the judgment was arrested. And this is further shown by the fact that the said court subsequently amended the rule, and gave to the commissioners under the rule power to take affidavits, bail, &c. in criminal cases. The circuit court therefore had no jurisdiction or right to order the recognizances to be estreated. If Rapelje had authority to take recognizances in criminal cases, still the recognizances in question were not taken nor made returnable pursuant to law, so as to give the circuit court of the United States jurisdiction of the matter of the recognizances. There was no examination of, or proof against, the prisoner, nor were the recognizances made returnable before any court, but before a judge at chambers.

II. The defendant, although a marshal of the United States, did not collect the money under or by virtue of any process or authority of any court, or receive the same in his official character. He acted merely as the agent of the plaintiff to pay it over to the United States. And no act having been done on the part of the United States amounting to an acknowledgment that the receipt of the money by the defendant was a payment to them, his receiving the same did not discharge the plaintiff's liability to the United States. The plaintiff has the right to

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demand and have back his money from the defendant, even if the recognizances shall be held to be valid. (*Chit. on Cont.* 617, ed. of 1842. *Williams v. Everett*, 14 *East*, 582, 597. *Seaman v. Whitney*, 24 *Wend.* 260. *Brind v. Hampshire*, 1 *Mees. & Welsb.* 365. *Wedlake v. Hurley*, 1 *Cromp. & Jero.* 83. *Scott v. Porcher*, 3 *Mer.* 651. *Owen v. Bowen*, 4 *Carr. & Payne*, 93. *Taylor v. Lendy*, 9 *East*, 49.)

III. If, however, the defendant in the receipt of the money, may be claimed to have been the agent of the United States, yet the plaintiff would be entitled to recover the money back from the defendant in this action, on the ground of its having been parted with under mistake of material facts: the defendant not having paid it over to his principal before suit brought. Rapelje supposed he had authority given to him to take the recognizances, when he had not. This was a mistake of fact, and not of law. The commissioner *might* have had power to take bail in criminal cases. The court *could* have conferred it upon him, but had not done so. Whether they had or not, was a *fact*. And the plaintiff, when he executed the recognizances, and when he deposited the money with the defendant to be paid over to the United States, supposed and believed that Rapelje had had authority given to him to take such recognizances. These were mutual mistakes of material facts supposed to exist, and which did not exist, and which alone influenced the plaintiff to part with his money. (*Story on Agency*, § 300. *Lazall v. Miller*, 15 *Mass.* 207. *Milnes v. Duncan*, 6 *Barn. & Cress.* 671. *Putnam v. Westcott*, 19 *John.* 73. *Mowatt v. Wright*, 1 *Wend.* 355.)

IV. As it does not appear that the United States have made any claim, or pretence of claim, to the money in the defendant's hands, the only question before the court is whether the plaintiff, or the defendant, as between them personally, is entitled to the money; and personally the defendant has neither a legal or equitable right to retain the money from the plaintiff.

The exceptions on the part of the plaintiff were well taken; and the judgment rendered by the superior court in favor of the defendant was erroneous, and should be reversed.

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F. F. Marbury, for the defendant. I. The recognizances taken before Rapelje, and the orders of the circuit court of the United States estreating them, and directing execution to issue, were legal and valid. (*Act of March 2, 1793, § 4. 1 Stat. at Large, p. 394. 2 Id. 679. Act of Feb. 20, 1812, § 1. Rule 104 of Circuit Court.*) It has never been decided that a United States commissioner has not power to take bail in criminal cases. *Hornbuckle's case* does not decide it. The statute is that he may take bail but not affidavits. (*Burr's Trial, 80. 1 Gall. 15. Case of the Alligator, Id. 476.*)

II. But if there was any defect, or irregularity, in those recognizances, or in the rules estreating them, the circuit court was the proper tribunal to correct such defect, or irregularity. And that court having twice expressly refused to do so, such refusal is to be deemed and taken as the judgment of that court, either that there was no such defect or irregularity as is now imputed, or that the plaintiff was not entitled to the relief which he sought. It is the judgment of that court, in the case; and so long as that judgment stands, and the rules estreating the recognizances and awarding execution thereon remain in force, no other court will look behind them, or allow the inquiry to be made in a collateral suit, whether the previous proceedings were regular; but will presume them to have been so. (*U. States v. Lathrop, 17 John. 4. Matter of Ferguson, 9 Id. 239. 1 Story's Laws of U. S. 800. The People v. Nevins, 1 Hill, 155. Supervisors of Onondaga v. Briggs, 2 Id. 136; S. C. 2 Denio, 29. Mackay v. Blackett, 8 Paige, 388. People v. Collins, 19 Wend. 56. People v. Bristol & Rensselaer Turnpike Co., 23 Id. 226.*)

III. The payment to the defendant, by the plaintiff, was either a payment under coercion of law, or legal process, or, it was a voluntary payment made by the plaintiff, without any fraud on the part of the defendant; and with full knowledge of all the facts, or the means of such knowledge, on the part of the plaintiff. In either case, it is well settled that the money so paid cannot be recovered back. 1. There were rules of a competent tribunal, estreating the recognizances, and awarding executions

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thereon. The deputy marshal exhibited those rules to the plaintiff, and he paid the money. This was a payment under legal process, within the decisions on that subject, and cannot be recovered back. (*Harriott v. Hampton*, 7 T. R. 269. 2 *Smith's L. Cas.* 237. *Chit. on Cont.* 638. *Kist v. Atkinson*, 2 *Camp.* 63. *Hamlet v. Richardson*, 9 *Bing.* 644. *Loomis v. Pulver*, 9 *John.* 244. *Brown v. McKenally*, 1 *Esp.* 279. *Milnes v. Duncan*, 6 B. & Cress. 679. *Kendall v. Atkin*, 10 *Bing.* 438. *Mowatt v. Wright*, 1 *Wend.* 355. *Hubberton v. Wakefield*, 4 *Camp.* 58.) 2. If this was not a compulsory payment, under legal process, then it was a voluntary one, without any fraud on the part of the defendant. And it was made with full knowledge of all the facts, or with the means of such knowledge on the part of the plaintiff; in which case the payment is conclusive, and cannot be recalled. (*Goodall v. Lowndes*, 6 *Ad. & El.* 464. *Goodman v. Sayer*; 2 *J. & W.* 263. *Sprague v. Birdsall*, 2 *Cowen*, 419.)

IV. If this was a case of payment under mistake, it was a mistake of law, and not of fact. And money paid under mistake of law cannot be recovered back.

V. But even if there was a mistake of fact, it does not follow that the plaintiff is entitled to recover. 1. It is not every mistake of fact which will enable a party to recover back money paid under such mistake. 2. When a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, he cannot recover it back again in an action for money had and received. And the principle which allows the plaintiff in the action of assumpsit to recover what, *ex æquo et bono*, he is entitled to, operates in favor of a defendant when called on to pay money. If he can show the better equity, he will be entitled to retain it. (*Moses v. McFarland*, 2 *Burr.* 1010. *Eddy v. Smith*, 13 *Wend.* 48. 1 *Story's Eq.* 121. *Brisbane v. Dacres*, 5 *Taunt.* 143. *Bize v. Dickeson*, 1 *T. R.* 285. *Cartwright v. Rowley*, 2 *Esp.* 723. *Haynes v. Hayton*, 7 B. & C. 293. 2 C. & P. 631. *Bilbie v. Lumley*, 2 *East*, 469.)

The claim of the plaintiff, under the circumstances of this

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case, is without any equity to support it; and the judgment of the superior court should be affirmed.

By the Court, HURLBUT, P. J. It is contended by the defendant that he was authorized to receive the money, and that his receipt would be a discharge of the recognizances. The plaintiff, on the contrary, insists that the commissioner who issued the warrant had no right to take recognizances in criminal cases. On this point we are not fully satisfied; but we are of the opinion that the recognizances should not have been made returnable at chambers. The prisoner could not be bound to appear there; but the recognizances should have been made returnable before the court, at a term thereof. The majority of this court have come to the conclusion that the recognizances, and all subsequent proceedings, were utterly void. We have tried, we confess, to come to a different result, but find it impossible. There being a moral obligation resting upon the bail, had the money been received by any one having authority to apply it to the satisfaction of the recognizances—if it had reached its destination—the court might have allowed it to remain there. In that case we might have held that this was a voluntary payment, and if made under any mistake, under a mistake of law merely. The marshal bears the same relation to the circuit court of the United States that a sheriff does to our county courts; and his duties are very analogous to those of a sheriff. Now it cannot be contended, that Waddell was authorized to receive this money before an execution was duly issued, and placed in his hands. Then he could have done it: but until the process of the court was in his possession, he had no right to the money. Suppose him to have received this money as marshal, he having no process, and then he should squander it, the recognizance would not be considered paid. In this case, if the payment had been made to the United States through one properly authorized to receive it, we might hold the payment binding. Even if the money was handed over to the United States, we might so hold; but such is not the case. It is still in the defendant's hands.

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The superior court, in their decision, take the ground that as Waddell has been in the habit, for a long time, of receiving fines, penalties, &c., and afterwards accounting for them, this course has become sanctioned by usage; and that congress, in passing its annual appropriation bill, sets apart certain moneys *in aid of* the fines and penalties in the marshal's hands, towards the contingent expenses of the court, thus making him virtually a disbursing officer of the government. This is a broad inference from narrow premises, and we cannot rest Mr. Waddell's authority to receive that money on so untenable and frail a foundation. How then does the matter stand? We can regard Waddell in no other light than as the agent of Bottomley, in this transaction. And while on his way to execute the commands of his principal, he is stopped by him and the authority revoked. Now if the defendant had been at the same time the agent of the government, for the purpose of receiving the money, the case would be different. But such is not the fact. We have come to this conclusion most reluctantly, because there can be no doubt but that the money is properly due to the government; but they must resort to their action upon the recognizances. The judgment of the superior court must be reversed. and a venire de novo awarded.

McCoun, J., dissented from the opinion of the majority of the court, and concurred with the superior court. The payment by the plaintiff to Waddell was a voluntary payment, and its receipt by the marshal must be considered as a receipt by the government he represented. After such a payment, entirely voluntary on his part, the plaintiff has no right to complain, even though the recognizances were void. The money, when it came into the marshal's hands, became vested in the government, and by previous acts of congress concerning moneys thus in the marshal's hands, became appropriated. I am not prepared to say, that even if these recognizances were void, that fact can be taken advantage of in this court. The recognizances have already been acted upon in another tribunal, by

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the order entered for their escheatment, and directing execution to issue thereon; and it seems to me that the party should be left to his remedy there.

MONROE SPECIAL TERM, September, 1847.

Welles, Justice.

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Where an injunction has been allowed by an officer competent to act in either of two characters, and where it does not appear clearly in which character he did act, it will be presumed he acted in the higher office of judge of the court, instead of that of injunction master.

A court of equity has jurisdiction to restrain a party, by injunction, from proceeding against the person, and the equitable interests, of his debtor, under the third and subsequent sections of the act to abolish imprisonment for debt and to punish fraudulent debtors, in cases proper for the interference of such court.

That statute, as regards its provisions for compulsory process against debtors by contract, is a mere civil remedy.

Where a court of equity has acquired jurisdiction of a suit for one purpose, it may retain it for all purposes, which are necessary, in order to afford complete relief.

A decree cannot be impeached, after enrolment, except by a bill of review, or a bill in the nature of a bill of review, charging fraud.

Where the assignee of a decree in a foreclosure suit is unconscientiously enforcing the same, against the mortgagor, for the deficiency, in violation of an agreement made by the assignor not to do so, a court of equity has power to interfere, for the protection of the mortgagor. And the mortgagor is not bound to wait until the deficiency is wrung from him, by execution upon the decree, or by proceedings under the Stilwell act, before he can ask for that protection.

IN EQUITY. Motion to set aside, or dissolve, injunction. The bill stated that the plaintiff gave his bond and mortgage on 84 acres of land in Niagara county, to one William Swain, of Auburn, Cayuga county, bearing date May 28th, 1841, to secure the payment of \$1200 on demand. That on the 19th of September, 1840, the plaintiff sold and assigned to Swain two bonds and mortgages, one given by Aaron Stephens to the

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plaintiff, dated June 8, 1840, to secure \$1300, on certain lands in Monroe county; the other given by Josiah Wilcox to the plaintiff, dated November 7, 1839, on lands in Niagara county, to secure \$3000. That the consideration of the assignment of Stephens' bond and mortgage was \$1165, 25, and of Wilcox's, \$2881, 47; and that at the time of the assignment, the plaintiff, by an instrument in writing, guarantied the payment of the bonds and mortgages against Stephens and Wilcox. That on or about the 2d of October, 1842, the several bonds and mortgages having become due, Swain applied to the plaintiff for payment. That the plaintiff had become involved in debt, and so informed Swain, and at the same time told him that it would be difficult for Stephens and Wilcox to pay, and proposed that Swain should take the premises embraced in the several mortgages, in payment and satisfaction of the amount due to him; to which Swain at once agreed, provided, upon examination, he should find the lands to be worth the amount due on the bonds and mortgages. That in April, 1843, and before the sale first hereafter mentioned, Swain, with his son and the plaintiff, examined the mortgaged premises, and expressed his opinion that the several mortgaged premises were worth more than the moneys due, and at the same time agreed with the plaintiff, in consideration that the plaintiff promised to aid him in obtaining foreclosures of the mortgages and the title to the real estate, (the mortgaged premises,) without unnecessary delay, and at the least expense, that he would foreclose the mortgages, and either bid off each parcel for the amount of the incumbrance upon it, or if the lands were purchased at a less sum, the plaintiff should be released and discharged from all claims on account of any deficiency arising upon the sales. That the plaintiff, relying upon this agreement, aided Swain in various ways in obtaining foreclosures of the mortgages without delay and at the least expense, and forebore to make any effort to procure bidders, and did not attend the sales, &c. That each parcel of the real estate was worth more than the incumbrance upon it. That on or about the 12th of December, 1842, Swain filed his bill in equity, before the vice chancellor

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of the 8th circuit, to foreclose the mortgage given to him by the plaintiff; which bill was afterwards taken as confessed, and such proceedings were had that a decree of sale was entered, and the premises were sold pursuant to the decree, about the 19th of April, 1843, to Swain, for \$450; leaving a deficiency of \$978,19, for which the decree was docketed on the 16th of September, 1844.

The bill then stated, on information and belief, that the mortgages given by Stephens and Wilcox were foreclosed in chancery by Swain, and the mortgages were sold under the decrees, and bid off for sums much less than the amounts due, and that decrees were docketed for the deficiencies, against the plaintiff, for a large amount. That the first mentioned decree has been assigned by Swain to Myrick, the defendant, who resides in the county of Wayne.

That Myrick has commenced a suit on the decree assigned to him, in the common pleas of Monroe county, in the name of Swain; which suit is pending, and that no issue has been joined therein, and no default has been entered. That on or about the 4th of March, 1847, Myrick instituted proceedings under the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, against the plaintiff, before John E. Patterson, a judge of Monroe county courts, and obtained a warrant against the plaintiff, upon which he has been arrested by the sheriff of Monroe county, and that proceedings are still pending before the judge; and that the plaintiff has not yet controverted any of the facts on which the warrant issued. The bill prayed that Myrick might answer without oath; that the decree assigned to him might be discharged of record; that Myrick, and all claiming under him, might be perpetually enjoined from enforcing it against the plaintiff; and for a preliminary injunction restraining Myrick from assigning the decree, and from further prosecuting the suit in the common pleas, and the proceedings before Judge Patterson, or any other suit or proceeding founded on the decree, or for the collection thereof.

The bill was sworn to, March 8, 1847. It was presented to

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Judge Whiting while at Auburn, holding a court there, upon which he made the following certificate :

" I certify that an injunction shall issue on filing the within bill, according to the prayer thereof. March 8, 1847.

B. WHITING, V. C."

An injunction was thereupon issued, pursuant to the prayer of the bill, and served upon the defendant about the 9th of March, 1847. No bond was filed pursuant to the 31st rule of the then court of chancery.

The affidavit of the plaintiff's solicitor, read on this motion, stated that " the injunction was allowed and issued, as deponent has been informed by the messenger whom deponent sent with the papers to obtain said injunction, and believes the same was granted, upon an application made by W. H. Seward, Esq., in open court." The same affidavit stated that " after said injunction was issued, the same was modified by stipulation between deponent and the solicitor for the defendant, so as to allow the defendant to proceed to judgment at law." But the stipulation was not produced, and there was reason to believe it was a mere verbal arrangement.

An answer was put in, sworn to by the defendant, on the 19th of March, 1847, in which the giving of the bond and mortgage by the plaintiff to Swain was admitted as stated in the bill ; but the defendant denied all knowledge of any consideration paid by Swain to the plaintiff for the same, and he disavowed any knowledge of the circumstances stated in the bill in relation to the mortgages of Stephens and Wilcox, or the foreclosure thereof. He also denied, upon information and belief, the agreement between Swain and the plaintiff set forth in the bill, and the circumstances attending the same. But he admitted the foreclosure proceedings upon the mortgage given by the plaintiff to Swain, the sale of the mortgaged premises, a deficiency of \$978,19, and the docketing the decree for that sum, as stated in the bill. The answer also admitted the assignment of the decree by Swain to the defendant, the commencement of the suit thereon in Monroe common pleas, and that such suit was still

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depending, not at issue and no default entered. It also admitted the proceedings against the plaintiff before Judge Patterson, the issuing the warrant, and the plaintiff's arrest thereon, and that the proceedings were pending at the time of filing the bill.

A general replication to the answer was filed.

T. Hastings & H. R. Selden, for the defendant.

J. W. Gilbert & S. Mathews, for the plaintiff.

WELLES, J. The defendant moves to set aside the injunction as having been irregularly issued, upon the ground that no bond was filed in pursuance of the 31st rule of the late court of chancery, and because the order allowing the injunction did not direct a provision to be inserted, giving the defendant liberty to proceed to judgment at law, without prejudice to the equitable rights of the plaintiff, notwithstanding the injunction; agreeably to the 33d rule.

Before proceeding to consider the motion to *dissolve* the injunction, I will dispose of the question of *regularity*.

The vice chancellor of the seventh circuit had jurisdiction of the suit, on the ground that the defendant resided in the county of Wayne; and the bill was properly filed before him.

In allowing the injunction, therefore, the act would be regular, whether done by the person allowing it, as an *injunction master* at chambers, or as a *judge of the court of chancery*; that is to say, it would be regular for him to receive, and act upon, the application, in either capacity. If he did not possess jurisdiction to entertain the suit, it was competent for him to hear the application as an injunction master, and if the bill contained sufficient matter for the allowance of an injunction, he could make his certificate that an injunction ought to issue, upon the plaintiff's filing a bond according to the 31st rule of the court of chancery, and have directed a provision to be inserted in the injunction giving the defendant liberty to proceed to judgment at law without prejudice, &c., agreeably to the 33d

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rule. In the present case, the bill being properly filed before the officer who allowed the injunction, if he acted as vice chancellor, or as a judge of the court, it was regular for him to make his fiat for the issuing the injunction, absolutely ; without requiring a bond to be filed, or the insertion in the injunction of the provision referred to. In what character did he act in this case? I think where it is competent for the officer allowing an injunction to act in either of two characters, and where it does not appear clearly in which he did act, and as the court of chancery is always open, it should be presumed he acted in the higher office of judge of the court, in preference to that of injunction master; in which he was only empowered to act *ex officio*. (*Melick v. Drake*, 6 *Paige's Rep.* 470.)

In my opinion, the injunction was regularly issued.

The defendant also moves to *dissolve* the injunction upon the matter of the bill and answer, on several grounds; which I will proceed to notice in detail. It is objected that the court of chancery had no jurisdiction to restrain a party by injunction from proceeding against his debtor, under the third and subsequent sections of the act to abolish imprisonment for debt and to punish fraudulent debtors. (*Sess. Laws of 1831*, p. 396.) This statute, as regards its provisions for compulsory process against contract debtors, is a mere civil remedy. The 1st section abolishes imprisonment for debts due upon contracts generally. Section 2d limits the operation of the first, or rather excepts from its operation, certain specified cases. The 3d, and a number of the sections following, substitutes a new remedy for the creditor against the person of his debtor, in the place of that which the 1st section, limited and qualified by the 2d, had taken away; in the cases specified in the four subdivisions of the 4th section. It is said to be a statute execution against choses in action and other effects of the debtor not tangible by the ordinary *fi. fa.* (*Moak v. De Forrest*, 5 *Hill*, 605. *Ex parte Fleming and another*, 4 *Id.* 581.)

The question, on this branch of the case, is whether the court of chancery, at the time the bill in this cause was filed, had,

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and whether this court in the exercise of its equitable powers, has jurisdiction to restrain a party by injunction from proceeding against the person, and equitable interests, of his debtor, under the statute referred to in the cases mentioned. I think there are cases in which such power did exist in the court of chancery, and where it is now possessed by this court. If it were not so, an important branch of the remedial, equitable jurisdiction of the court would be cut off, or very much crippled. The third section of the act provides for two cases in which a creditor may apply for a warrant against his debtor; first, where he has commenced a suit against him; and second, where he shall have obtained a judgment or decree against him. The fourth section declares that no warrant shall issue, unless satisfactory evidence be adduced to the officer that there is a debt or demand due to the plaintiff from the defendant, for which the defendant, according to the provisions of the act, cannot be arrested or imprisoned. Suppose the application for the warrant is founded upon a judgment or decree, and not upon a pending suit; or upon a pending suit, being an action of debt in a court of law upon such judgment or decree, and the defendant is entitled to equitable relief against the judgment or decree, under the well known heads of equity jurisdiction of fraud, accident, or mistake; I have no doubt of the power of a court of equity to restrain the plaintiff by injunction from proceeding under the act, before the judge. If it were not so, a door would be opened for great injustice; the court of chancery would be ousted of a most valuable branch of its jurisdiction, and most important questions, of great delicacy and intricacy, would be transferred to tribunals utterly incompetent, in their structure and summary modes of proceeding, to afford ample and complete relief. I do not think it could have been the intention of the legislature to vest in all the numerous officers referred to in the act such important powers, with exclusive jurisdiction; without subjecting the parties to the control of a court of chancery, in cases proper for its interference.

The objection just considered is founded upon the assumption that the plaintiff had ample relief at law, and the seventh

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section of the act was referred to, which allows the party proceeded against before the judge to controvert any of the facts and circumstances, on which the warrant was issued. To this I think there are several answers. 1. I do not agree that the remedy at law was complete. It is by no means clear to my mind that the judge could inquire into the equitable considerations growing out of the agreement set up in this case; and if he could, it does not follow that he would have the exclusive jurisdiction over them. 2. By the seventh section referred to, the party can only *controvert*, that is deny, the facts and circumstances alleged. In almost every supposable case where the power of a court of equity would become necessary for the relief or protection of the party proceeded against, he would have to do more than simply to controvert the allegations which his adversary would think proper to make. As in this case, he would have to introduce new matters in avoidance. 3. The power of a court of equity to restrain this party from proceeding in his action in the common pleas of Monroe county is undoubted; and that being the case, this court may entertain jurisdiction of the whole subject matter in dispute, upon the ground that having acquired cognizance of the suit for one purpose, it may retain it for all purposes which are necessary, in order to afford complete relief. (*Story's Eq. Jurisp.* § 64.)

It is objected that the bill does not present a case for equitable relief, because it is founded upon an alleged agreement which impeaches a decree in another suit, upon matters arising prior to the entry of the decree. And it is urged, and authorities are cited to show, that a decree cannot be impeached after enrolment, except by a bill of review, or a bill in the nature of a bill of review, charging fraud. The general doctrine contended for by the defendant's counsel is not denied. In the language of Chancellor Kent, in *Davoue v. Fanning*, (4 *John. Ch. Rep.* 203,) "It would be most disorderly, and lead to great confusion and endless litigation, if a new and original bill between the same parties and concerning the same matters, could be sustained, while the former decree remained untouched. The decisions

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of the court have clearly and wisely established a different rule." The answer however is, that the bill in this case does not seek to impeach the decree mentioned, in the foreclosure suit of Swain against the plaintiff. The agreement set up in the bill contemplated such a decree, and is consistent with it. The agreement was incomplete, and could not be fully operative until the decree was entered; and it is on account of acts subsequent to its entry that the plaintiff complains. The complaint is that the assignee of the plaintiff in the foreclosure suit is unconscientiously enforcing the decree in that suit, for the deficiency, in violation of the agreement of his assignor not to do so, provided he, (the plaintiff in this suit,) would comply with certain provisions of the agreement on his part, which he alleges he has done. I am not able to perceive that the doctrine alluded to would be infringed by sustaining this bill.

It is also contended that the agreement set forth in the bill as the foundation of the relief prayed for, between the plaintiff and Swain, was a *nudum pactum*, being without sufficient consideration. The agreement was, in substance, that Swain would take the lands embraced in the mortgages, and discharge the plaintiff from personal liability; he (the plaintiff) to aid Swain in obtaining the foreclosures and the title to the lands without unnecessary delay, and at the least expense. The consideration of Swain's promise to discharge the plaintiff from personal liability, was the promise of the plaintiff to aid in the foreclosures, and in vesting the title in Swain. It was a case of mutual promises, and the bill alleges a fulfilment by the plaintiff of his part of the agreement.

The question whether the plaintiff's promise to Swain was a sufficient consideration to support the agreement of the latter, will depend upon whether the promise of the former, if performed, would be either a benefit to Swain, or an injury or inconvenience to the plaintiff. Could the plaintiff have aided Swain in the foreclosures and in obtaining the title, either as to the expense, or as respects expedition? It would be too much to say he could not. He could omit to appear in the suits, or to bid or procure bidders at the master's sale, and thus save time

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and expense. Suppose he had paid up the mortgages, or produced, by his exertions, so much competition at the master's sales as to result in a large surplus, as he would have had a right to do, except for the agreement. He would have been entitled to the benefit of that surplus, and Swain would get the amount due him in money, and not the land, which it is alleged is worth more than the amounts of the mortgages. But by the plaintiff's performing his agreement, as he alleges he has done, Swain has got the lands, and thus derived a benefit from the agreement, and the plaintiff, by letting the land go for less than its value, has sustained an injury.

I do not feel authorized, in this stage of the suit, to hold the agreement void for want of consideration, and to dissolve the injunction on that ground. But I think it should be retained until the final hearing of the cause.

The defendant also contends, that if the agreement was valid, the plaintiff's only remedy was by an action at law for the breach of it. I cannot agree to this proposition. I do not think the plaintiff was bound to wait until this deficiency was wrung out of him by execution upon the decree, or by proceedings under the Stilwell act, before his right to redress would attach.

The ground taken upon the argument that the whole equity of the bill is denied in the answer, cannot be sustained. Nearly all the material facts stated in the bill, as constituting the ground for equitable relief, are answered, and some of them are denied only upon information and belief of the defendant. This is not sufficient. (1 *Barb. Ch. Pr.* 640.)

But I am not able to perceive any sufficient reason why the defendant should not be permitted to proceed to judgment in the action commenced in the court of common pleas of Monroe county in the name of Swain, on the decree assigned to him by Swain; without prejudice to the equitable rights of the plaintiff in this suit. And I shall direct an order to be entered to that effect; without costs to either party as against the other.

SAME TERM. *Before the same Justice.*

HOVEY and others, administrators, &c. appellants, vs. SMITH and others, respondents.

What articles of property are to be considered fixtures.

A pump and pipe, balances and scales, and a beer pump are *prima facie* personal property, and can only descend to the heir in consequence of being annexed to the freehold in such a manner, and under such circumstances, as to come within the seventh section of the article of the revised statutes relative to the duties of executors, &c. in taking and returning inventories.

As a general rule, *it seems*, that previous to the passage of the act to abolish distress for rent, where a tenant died leaving rent in arrear, the landlord could distrain for rent, after administration granted. But if the landlord was also the administrator of the deceased tenant, he could not distrain. For a landlord, by accepting the office of administrator of his tenant, waives his right to distrain.

A surrogate, upon an accounting by administrators before him, on the application of creditors, is authorized to give a preference to a charge made by the administrators for rent paid on a lease of premises held by the intestate, if it appears to his satisfaction that such preference will benefit the estate. And where a surrogate gives a preference of that nature, and certifies, in his decree, that it appeared to his satisfaction that it would benefit the estate, his decree is conclusive upon that point. And the appellate court will not inquire whether there was any proof of that fact before the surrogate.

IN EQUITY. Appeal from a decree or sentence of the surrogate of Monroe county, made on the 25th day of June, 1846.

The respondents, as creditors of John B. Pettingill, the intestate, on the 26th of March, 1846, presented their petition to the surrogate, setting forth that letters of administration upon the estate of the intestate were granted to the appellants, Luther H. Hovey and Wealthy Parker, by the surrogate of Monroe, about the 16th of October, 1843; that more than eighteen months had since elapsed; that the respondents were creditors of the intestate, having a demand against his estate still outstanding and unpaid; that the appellant Wealthy Parker, late the widow of the deceased, had since the granting of said letters of administration, intermarried with the appellant Eldred Parker; and praying that the appellants might render an account of their proceedings. Upon which the surrogate issued his citation, requiring the appellants to ap-

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pear before him on the 7th of May, 1846. This citation having been duly served, the petitioners and Eldred Parker and Wealthy Parker appeared, and Hovey did not appear. Wealthy and Eldred Parker being required to render an account, each made an affidavit; the said Wealthy, that she had never taken any part whatever in the settlement of the estate, the whole business having been done and transacted by Hovey; that she had never collected any money due the estate, nor had in her possession, or under her control, any of the personal estate, except such as was set off to her as the widow of said Pettingill, by the appraisers, which was estimated at \$300. Eldred Parker stated in his affidavit, that he was married to the said Wealthy on the 19th November, 1845, and he verified upon information and belief the facts stated in her affidavit, and alleged that he had in no manner interfered with the property, and that he was ignorant of the condition of the estate.

The respondents then proved their demand, amounting to \$205,13, and introduced the inventory of the personal property of the estate made on the 25th October, 1844, subscribed by the appraisers and the administrators Luther H. Hovey and Wealthy Pettingill. The inventory consisted of three schedules, or lists; the first, of articles amounting in the aggregate to \$513. The second, of articles included in a chattel mortgage given by the intestate, in his lifetime, to Charles Stone, to secure the payment of \$301,57, and which articles were appraised at \$336. And the third contained a list of articles for the widow and minor children in pursuance of the statute, (2 R. S. 83, § 9,) which were not appraised; together with articles of the value of \$150, set apart for the widow and minor children, under the act of 11th April, 1842. (*Sess. L. of that year, p. 193.*)

The respondents, by way of surcharging the inventory, gave evidence to show that the intestate owned personal property not inventoried, to wit; a pump and pipe, balances and scales, and a beer pump, of the value of \$40. And also an unexpired term in a lease of a farm for five months at \$25 a month, of the value of \$125. It appeared that on the 3d December,

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1842, Pettingill, the intestate, took a lease of a farm of about 80 acres, in the town of Greece, from the appellant Hovey, for five years from the first day of April then next, at a yearly rent of \$300, payable on the 1st of November of each year; that Pettingill died on the 5th of October, 1843, and the whole of the first year's rent fell due on the 1st of November, 1843. Pettingill's family continued in possession after the 1st of November. Hovey, the landlord, collected the rent for one year by distraining upon the property of the intestate on the premises leased. The distress warrant was dated November 3, 1843. A large portion of the property which was inventoried was taken and sold upon it for much less than the sum at which it was appraised in the inventory.

The surrogate charged the appellants with the two first lists or schedules of the inventory.

One of	\$513,00
Do. included in chattel mortgage,	336,00
Property not inventoried, viz. pump and pipe,	
balances and scales, and beer pump,	40,00
Lease 5 months, to April 1, 1844, at \$25,	125,00
	<hr/>
	\$1014,00

And credited them as follows:

Expenses of funeral, and letters of adm. \$33,32	
Paid chattel mortgage,	301,57
One year's rent on lease,	300,00
Commission on \$1014, at 5 per cent,	50,70—685,59
	<hr/>
	\$328,41

Leaving a balance of \$328,41 to be distributed among 4th class creditors. It appeared that the appellants had paid various debts of the intestate belonging to the 4th class, amounting to \$164,35.

On the 25th day of June, 1846, the surrogate made a decree in substance that the amount of the personal estate of the intestate with which the appellants were chargeable was \$1014,00

From which he deducted for preferred debts	
paid by them, and their commissions,	685,59

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Leaving a balance of \$328,41

And that the remaining debts of the intestate, including the demand of the respondents, amounted on the 1st day of April, 1844, as follows :

Debts paid by appellants belonging to 4th class,	\$164,35
Demands of respondents unpaid,	205,13

Amounting in all to	\$369,48
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And that of the last sum, the above balance of \$328,41, would pay at the rate of 88 $\frac{1}{2}$ cents upon each dollar ; which would allow at that rate to the respondents, to be paid by the appellants, \$182,33, with interest from 1st of April, 1844. And he decreed payment accordingly, with costs to the respondents ; which were afterwards taxed at \$51,99.

From this decree the appellants appealed, on the following grounds. 1. That it did not appear that the pump and pipe, balances and scales, and beer pump, (articles not inventoried,) ever came to the hands of the appellants. That the pump and pipe were not personal property ; and because neither of these articles were proved to have belonged to the intestate in his lifetime. 2. Because the surrogate charged the appellants with the \$125, for the rents and profits of the leasehold property. 3. Because the appellants were charged with the full amount of the goods inventoried, when it was proved that most of them, and all but \$60 worth were sold for \$300,61 ; that the sum for which these articles were sold, deducting the costs of the distress and sale, together with the appraised value of those inventoried and not sold under the distress warrant, is all that should have been charged. 4. Because the surrogate decreed the payment, by the appellants to the respondents, of \$182,33 with interest from 1st of April, 1844. 5. Because the surrogate decreed the payment of respondents' costs.

The respondents, in their answer to the petition of appeal, complain of the decree on the ground that it gives preference to the charge of \$300 for rent ; there having been no proof to show that such preference would benefit the estate.

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E. Griffin, for the appellants.

C. Tucker, for the respondents.

WELLES, J. By the 4th subdivision of section 6 of article 1, of title 3, of chapter 6, of part 2 of the revised statutes, (2 R. S. 83,) it is provided that "things annexed to the freehold or to any building for the purpose of trade or manufactures, and not fixed into the wall of a house, so as to be essential to its support," shall be deemed assets, and shall go to the executors or administrators as personal estate. By the 7th section, "things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the 4th subdivision of the last section." Whether the pump and pipe, balances and scales and beer pump were annexed to the freehold at all; or if so, whether they were for the purpose of manufacture, does not sufficiently appear by the transcript to justify this court in interfering with the decree of the surrogate in that respect. They were *prima facie* personal property, and could only descend to the heir, in consequence of being annexed to the freehold, in such a manner, and under such circumstances, as to come within the seventh section. It was a question of fact, which the surrogate could best decide; as was also the question, whether they belonged to the intestate at the time of his death.

I am not able to perceive that any law has been violated, or any injustice done by the surrogate's charging the appellants with rent for five months of the unexpired term on the lease. The 6th section of the act referred to, provides that leases for years shall be deemed assets. This was a lease for five years, commencing April 1, 1843, at \$300 a year, or \$25 a month. The first year's rent became due on the 1st of November, 1843, and has been paid, and the appellants have been allowed the amount by the surrogate. There were nearly six months of the first year unexpired at the death of the intestate. There was no direct testimony as to the value of this unexpired term; but within a

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year previous, (at the date of the lease,) Pettingill had estimated it at the rate of \$300 a year, by agreeing to pay that sum for it, which, in the absence of any proof of its real value, I think was properly taken by the surrogate as the true value.

The surrogate disregarded the proceedings by distress to collect the rent, and charged the appellants with the property inventoried, at the value set upon it in the inventory; which was much lower than it was sold for under the distress warrant. The appellant's counsel contends that the landlord had a right to distrain for this rent, and that therefore the surrogate should have charged the appellants with only what the property was sold for, after deducting expenses; and that even if the right to distrain did not exist, the amount the property brought at the sale was the amount the appellants should have been charged with; as it must have been a public sale, and the amounts bid would be the best criterion of its value. The latter part of this proposition I cannot subscribe to. Every man is presumed to know the law; and it cannot be supposed that purchasers at an unauthorized sale of property, when no title would be acquired, or at most a doubtful one, would be willing to offer as much as if the sale was legal and valid, so as to pass a good title.

The more important question is, whether the proceedings by distress in this case were legal. As a general rule, I am inclined to think, that before the passage of the act to abolish distress for rent, (*Sess. Laws of 1846, p. 369, ch. 274.*) where a tenant died leaving rent in arrear, the landlord could distrain for rent, after administration granted. It was held in *Hughes v. Sebre*, (2 A. K. Marsh. 227,) that where a tenant died intestate, the landlord could not distrain *before administration*. I should think the converse of the rule would hold—that the landlord could distrain after administration. (*See also Toller on Ex. 277, Phil. ed. of 1829, § 3. Id. 475.*)

But however this may be, I am clear that Hovey, the landlord, who is also the administrator in this case, could not distrain. He was appointed administrator on the 16th of October, 1843, and immediately accepted the trust, and entered upon the

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discharge of its duties. The rent became due on the 1st of November following, some three weeks after the death of Pettingill, his tenant, and the next day the distress warrant was issued, directed to a constable of Monroe county, commanding him to "distrain the goods and chattels of John B. Pettingill, tenant," &c. Without criticising the form of the warrant, however, I think he waived his right to this remedy, by accepting the office of administrator. His duty as such was utterly incompatible with the right to distrain, as landlord of the premises. As the representative of the intestate, he was bound to protect the interests of the estate. The law was sufficiently severe in allowing the landlord to issue his process, in the nature of an execution, for the collection of his rent, in the first instance, without impleading his debtor in a court of justice, and obtaining a judgment for his demand, as other creditors, equally as deserving, were bound to do. The proceeding was a relic of feudalism, and belongs to the history of barbarous ages; and I trust it is never again to become a part of our jurisprudence. But to allow the landlord to administer on his deceased tenant's goods, and then to distrain upon those goods, would be a mockery of justice, too disgusting to be tolerated for a moment. Who would there be to question his right, or to replevy the goods in case of irregularity, or any unlawful or oppressive proceeding on his part? It follows that the surrogate was right in disregarding the distress warrant, and the proceedings thereon. The respondents were, therefore, entitled to a decree for a *pro rata* share of the assets in the appellants' hands to be administered; and I am not prepared to disturb the decree, because costs were given to the respondents.

The respondents complain that the surrogate gave preference to the \$300 claim for rent, over other debts in the fourth class. On that subject, the decree states that it appeared, to the satisfaction of the surrogate, that such preference would benefit the estate. If that was so, the 30th section of the act, (2 R. S. 87,) authorized such preference. It will not do for this court, sitting in review, to say it did not appear to the sur-

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rogate that such preference would benefit the estate ; when he certifies that it did so appear. Upon the whole, I am satisfied to let the decree stand as it is.

Decree affirmed with costs.

SAME TERM. *Before the same Justice.*

THE PEOPLE, ex rel. J. McKnight, vs. BEEBE, sheriff, &c.

Upon the coming in of the return to an alternative mandamus, the relator may traverse the return, or any material part of it, by plea. Or, he may demur to the return ; and then the cause will be heard as an enumerated motion. He may elect either to pursue that course, or to bring on the case as a non-enumerated motion, founded upon the return ; unless the court specially directs formal pleadings to be interposed.

A tender of the amount due upon a judgment, if the same is not accepted, does not operate as an extinguishment of the lien.

The right of a judgment creditor to redeem premises which have been sold upon a prior execution against the property of his debtor, cannot be defeated by the act of the purchaser, in paying the judgment under which the creditor claims to redeem, without his consent ;—especially where such payment is not made until after the redeeming creditor has actually paid to the sheriff the amount of the purchaser's bid, with interest, and has commenced delivering to the sheriff the papers required by the statute to be presented to, and left with, him.

A stranger to a judgment has no right to pay the same, for the purpose of extinguishing the lien thereof and preventing the holder from redeeming by virtue thereof.

A parol executory agreement for the sale of a judgment, for a sum exceeding \$50, where no part of the evidences thereof are accepted, or received, by the buyer, and no part of the purchase money is paid, is within the statute of frauds.

A decree of a court of equity for the foreclosure of a mortgage, extinguishes the lien of the mortgage ; although such decree is merely enrolled, and not docketed.

After a mortgage has been satisfied by a sale of the mortgaged premises under a decree of foreclosure, neither the mortgage, nor the decree, is any longer a lien upon the premises.

A creditor by mortgage never had a right to redeem premises sold under execution, either as grantee, or creditor, until it was given to him by the act of May 26, 1838.

A creditor by mortgage cannot redeem, under that act, unless his mortgage is a lien and charge upon the whole of the premises sold. If it is a lien upon a portion of the premises, only, it is insufficient.

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MOTION for a peremptory mandamus, founded upon the defendant's return to an alternative mandamus commanding him to convey to the relator certain premises sold by the defendant on execution, or show cause, &c. The return states, among other things, the following facts.

That on the 27th day of September, 1845, the defendant, as sheriff of Orleans county, sold the premises in question, by virtue of an execution against John Henderson, the former owner, in favor of Clark S. Potter, issued on a judgment recovered January 4, 1844, in a justice's court, and docketed in the clerk's office pursuant to law; that Archibald McAlister and John L. Moulthrop, formerly partners in the mercantile business, became the purchasers at the sale, for the sum of \$157,46, and received a certificate of sale. The premises consisted of two separate parcels of land situate in the village of Albion in said county, the first parcel containing about half an acre of land, and the second parcel nearly one-fourth of an acre, and both particularly described by metes and bounds. On the 12th of October, 1844, the said John Henderson executed a mortgage to Clark S. Potter, Archibald McAlister and John L. Moulthrop, upon a portion of the said premises, being the second parcel, described as containing nearly one-fourth of an acre, conditioned to pay to said Potter \$125, being the amount of a note made by Henderson to Potter, dated 11th October, 1844, payable in one year, with interest; to McAlister & Moulthrop \$150, being the amount of a note made by Henderson to them, payable in one year, with interest; and to pay in one year to said Potter, and to said McAlister & Moulthrop, all sums and amounts in which he should become indebted to them on store account between that time and the end of one year. This mortgage was duly acknowledged on the 12th and recorded on the 14th of October, 1844. The return states that Potter never had any interest in this mortgage; that the note described had not been given to him by Henderson—the arrangement under which it was to have been given having been abandoned, and no account made by Henderson with him. That on the 2d of March, 1846, Moulthrop assigned all his interest in said mortgage to McAlister.

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That on the 26th Dec. 1846, (the 27th being the last day of the fifteen months from the sale,) McAlister, by his attorney, left with the defendant a copy of the mortgage, duly certified by the clerk of the county, also a copy of the assignment of the mortgage by Moulthrop to McAlister, and McAlister's affidavit, dated December 26, 1846, verifying the assignment, and stating the amount due at that time to be \$337,15. And he also left with the defendant the certificate of sale, and gave him notice not to permit the relator, or any other person, to redeem the premises so sold without paying the mortgage, as well as the sum bid at the sale.

That a few minutes after McAlister left the copy of the mortgage and affidavit and gave the notice, and on the same day, the relator presented to and left with the defendant, a copy of the docket of a judgment recovered by William G. Swan, administrator, and Susan Swan, administratrix of C. W. Swan deceased, against the said John Henderson, before a justice of the peace of Orleans county, on the 8th of October, 1844, for \$108,20 damages and costs, a transcript of which was filed and the judgment docketed in the office of the clerk of Orleans county on the same day the judgment was rendered; which copy was duly certified by the county clerk, with a copy of the assignment of the said judgment to the relator, verified by his affidavit, and his affidavit stating the true sum then due on the judgment to be \$125,98; and that the relator then paid the defendant \$172, being the amount bid on said sheriff's sale, and interest at seven per cent. At the same time the relator left with the defendant a copy of a mortgage, duly certified by the clerk of said county, given by said Henderson and wife to the relator, upon the second parcel of the premises in question, bearing date March 28, 1845, to secure \$300; \$150 in one year from the 1st of September next after the date, and the remaining \$150 in five years from date, with interest, accompanied with an affidavit of the relator stating that the sum due on the said 26th of December, 1846, upon said mortgage, over and above all payments, was \$336,63.

That at the same time the relator was giving the defendant

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the said papers, McAlister paid the defendant \$127 in specie, and claimed to pay the Swan judgment, the execution upon which was in the defendant's hands for collection, issued on the 5th of October, 1846, returnable in ninety days, and delivered by said Swan to the defendant before the assignment of the judgment to the relator, there being no property of Henderson on which to levy; and McAlister at the same time paid the defendant his fees on the execution, which, the return states, fully satisfied the execution, and that the same has been by the defendant returned satisfied. "And the said McAlister, at the same time he paid the said execution also directed me [the defendant] to pay the said \$172, left in my hands as aforesaid by said McKnight, back to him the said McKnight." Which sum, and also the said \$124.98 due upon the said Swan judgment, the defendant tendered to the relator, but which he refused to accept, and both sums remain in the defendant's hands, at all times ready for the relator and subject to his order. And that on the 4th day of January, 1847, the defendant executed a conveyance of said parcels of land to said McAlister.

The return further states that McAlister foreclosed the mortgage given by Henderson to him, Potter and Moulthrop, as aforesaid, in chancery; making Henderson, Moulthrop, Potter, the relator, Wm. S. Swan, and Susan Swan, and divers other persons having liens on the said premises subsequent to the mortgage, parties to the foreclosure; all of whom were served with process, and the usual decree of foreclosure and sale was entered on the 25th of August, 1846.

That at the commencement of the foreclosure suit the complainant therein owned the Swan judgment, by assignment, and the Swans were made parties as subsequent incumbrancers, and on or about the 1st of August, 1846, and before the decree was entered, Swan obtained a reassignment of the judgment.

That the mortgaged premises (the second parcel) were advertised to be sold by a master, by virtue of the decree, on the 16th of October, 1846, at which time they were put up for sale at public auction by the master, subject to a mortgage of \$200, for purchase money, and a lease to expire May 1st, 1847. That

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Swan attended the sale ; when the complainant's solicitor proposed to him *that if he would agree to dispose of his judgment and take no other measures about it, the solicitor would bid the premises up, for enough over and above the decree and costs, to pay the judgment, and he should have the money, when the complainant took his decree from the master.* That Swan said he would bid \$136 and no more, and would agree to the proposition of the solicitor. That Swan bid \$136, and the solicitor bid off the premises for the complainant McAlister, for a sum exceeding the amount required to be raised by the decree, which excess was sufficient to pay the Swan judgment ; and the complainant subscribed the written terms of the sale, upon being informed of the agreement made between the solicitor and Swan.

The said return then proceeds as follows : " I further certify, that the said master lives some eight or nine miles distant from the village of Albion. That soon after the said sale the said master came to Albion, among other things, to receive the said surplus money and give McAlister a deed. But the said John Henderson then and there pretending that he was about to raise the money to pay the said bid so that he might keep the said premises, thus kept, by such inducements, the said McAlister from taking his deed at that time, as he was intending to do. On the said master's coming again, the said Henderson interfered, with the same pretences, and regarding his solicitations, the said McAlister postponed taking his deed at that time, and the said master not coming again, the said 26th December came ; McNight availed himself of the opportunity, took an assignment of the said judgment, and sought to redeem the premises. But of this postponement Swan was informed, and told the reasons, and he did not object to it."

The return further states, that on the 26th of December, previous to the relator's presenting his papers to the defendant, or McAlister, as alleged in the alternative writ, McAlister tendered to the relator the amount of the Swan judgment and interest, *in specie*, and upon the same being refused, McAlister deposited the same with the cashier of the Orleans County Bank for the

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relator, and gave him notice thereof. That the said decree had been enrolled but not docketed. That on the 26th of April, 1847, McAlister took an assignment of the said certificate of sale from Moulthrop, which assignment is recorded in the county clerk's office.

H. Stone & H. R. Selden, for the relator.

W. K. McAlister, for the defendant.

WELLES, J. It was contended on the argument, by the counsel for the defendant, that the sheriff could not look beyond the papers before him, and that it was manifest to him from those papers, and the conduct and claims of the parties on the 26th of December, 1846, that McAlister had acquired by virtue of the mortgage of the 12th of October, 1844, all the right of McAlister & Moulthrop, the original purchasers at the sheriff's sale.

Without taking time to consider how the case would stand, or which of the real parties litigant would have the advantage, upon the facts thus regarded, I think all the matters contained in the return which legally affect the questions to be decided are now before the court, and should be taken into consideration. The defendant is not at liberty to controvert any of them, and it was competent for the relator to have traversed the return, or any material part of it, by plea. Or he might have demurred to the return, and then the cause would have gone upon the calendar for the general term, and been heard as an enumerated motion. He had his election between that course, and bringing on the case as a non-enumerated motion, founded upon the return, unless the court should specially direct formal pleadings to be interposed. (*The People, ex rel. Bentley, v. Comm'rs &c. of Hudson*, 6 *Wend.* 559. *See also* 16 *John.* 65.) I shall, therefore, consider the case the same as if it came up on a general demurrer to the return.

The first question is, whether the relator acquired "all the rights of the original purchaser," at the sale of the premises in

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question, by the defendant, as sheriff of Orleans county. On the 26th of December, 1846, the day before the expiration of the fifteen months from the time of the sale, he paid the defendant \$172, being the amount bid at the sheriff's sale with interest at seven per cent; and at the same time presented to, and left with the defendant, a copy of the docket of the Swan judgment duly certified by the clerk of the court in which it was docketed, a copy of the assignment of such judgment by the plaintiffs to the relator, verified by his affidavit, and an affidavit stating the true sum then due on the judgment to be \$125.98. This was prima facie a compliance with the statute. (2 R. S. 373, § 60.) But it is objected that the relator had no right to redeem the premises; for the reason that the Swan judgment was extinguished by payment to the defendant, who, as sheriff, held an execution which had been issued upon it, at the very moment the relator was attempting to use it for the purpose of acquiring the rights of the original purchaser, and after the relator had paid the \$172, to the defendant, as before stated. This payment was made by McAlister, who at the same time directed the defendant to pay back to the relator the \$172, which he had just paid to the defendant; which sum, together with the \$124.98 due upon the Swan judgment, was tendered by the defendant to the relator, and by him refused. The last sum had been tendered by McAlister to the relator, and in like manner refused before the latter paid the \$172 to the defendant, or did any thing towards redeeming the premises. So far as these transactions are to be regarded in the light of a tender, they form no obstacle to the relator's acquiring the right of the purchaser at the sheriff's sale. A tender upon a judgment, if not accepted, does not operate as an extinguishment of the lien. This was held in *Jackson v. Law & Nelson*, (5 Cowen, 248,) and in *Ex parte The Peru Iron Company*, (7 Id. 540.)

Nor was it, in my opinion, a *payment*, so as to operate as an extinguishment of the judgment. 1. It was too late. The relator had paid the \$172 to the defendant, and while he was in the act of presenting the papers required by the statute to be

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presented to, and left with the sheriff; the payment was made to the sheriff. The relator's right to be regarded as a judgment creditor, and as having in that character acquired the purchaser's interest in the premises, was so far, if not absolutely vested, as to place it beyond the power of McAlister to defeat that right, by paying his judgment, against his will. 2. I think also, the defendant had no right to accept the money of McAlister, as a payment of the Swan judgment. The relator had just before refused it, when tendered by McAlister. It was but a repetition of the effort just made by McAlister, to extinguish the lien of this judgment; and I think the relator had a right to disregard it, as interfering with his right to redeem. The defendant, so far as respected the execution upon the judgment, was the relator's agent, and was bound to follow his directions when the same were not contrary to law. If the relator was not bound to take the money from McAlister, the sheriff had no right to do it for him, without his consent. 3. McAlister had no right to pay the execution on this judgment, and thereby extinguish it. He was a stranger in respect to this judgment and execution. Laying out of view his agreement with Swan, at the master's sale, and the mortgage against Henderson of 12th of October, 1844, he had no more to do with the matter than any other stranger. He, with Moulthrop, had purchased the premises at the sheriff's sale, but that created no privity either with Henderson or the land, except that if the land should not be redeemed in fifteen months, he and Moulthrop would be entitled to a conveyance; and if it should be, then they would be entitled to their money and interest. (*Phyfe v. Riley*, 15 *Wend.* 248. *Clow v. Borst & Best*, 6 *John.* 37.) 4. It is urged, however, that the judgment in favor of Swan was provided for in the agreement made between him and McAlister at the master's sale, in pursuance of which, the latter bid for the second parcel of the premises a sum sufficient to satisfy both the decree and this judgment; and that the relator took the assignment from Swan, subject to all equities existing in relation to it. To this it is answered that the agreement was void under the statute of frauds.

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The statute, (2 R. S. 136, § 3,) is as follows: "Every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars, or more, shall be void, unless, 1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby: or, 2. Unless the buyer shall accept and receive a part of such goods, or the evidences, or some of them, of such things in action; or, 3. Unless the buyer shall at the time pay some part of the purchase money." In this case, the contract on the part of Swan was to "*dispose of the judgment, and take no other measures about it.*" That the agreement was directly within the statute, cannot admit of a doubt. It was a parol executory agreement for the sale of a chose, or thing in action, for over \$50, no part of the evidences thereof being accepted or received by the buyer, and no part of the purchase money paid.

The defendant contends that the lien of the Swan judgment was destroyed by the decree in the foreclosure suit, in which the Swans were made parties. I do not think the decree has that effect. 1. All the defendants in the foreclosure suit, except Henderson, were made parties, as having liens *subsequent* to the mortgage, and Swan's judgment was prior to the mortgage. 2. When the suit was commenced, McAlister was the owner of this judgment, by assignment, and before the decree was entered, he reassigned it to the Swans. McAlister was not at liberty to set up, that a judgment held by him, when he filed his bill, and assigned by him afterwards, had, by operation of the decree, lost its lien. 3. The mortgage was a lien on one parcel of the premises only, and the judgment upon both. The most that can be claimed is, that the decree extinguished the lien of the judgment upon the portion of the premises embraced in the mortgage. It certainly remained a lien upon the other parcel; and that would be sufficient to entitle him to redeem the whole. Section 53 of the statute, on this subject, is as follows: "If such judgment or decree be a lien on a specific portion only of any lot, tract or parcel so sold, the creditor having the same may acquire the title of the purchaser to the

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whole of such lot, tract or parcel, in the same manner as if such lien extended to the whole." (2 R. S. 372.)

I believe all the objections to the relator's right to acquire the title of the purchasers at the sheriff's sale have been considered. If none of those objections were valid, the defendant should have conveyed the premises to the relator; unless some other creditor has become a purchaser from him in pursuance of the 55th section of the statute. It is claimed that McAlister has become such purchaser, and that he was a creditor of Henderson by reason of the mortgage of the 12th of October, 1844. To this there are two sufficient answers. 1. This mortgage was merged in the decree entered upon it, which decree was enrolled, but not docketed. The lien of the mortgage was thus extinguished and gone. That a judgment at law extinguishes the debt upon which it is obtained, is too plain a proposition to require argument, or authority, to prove. And I am not able to see why a decree of a court of equity should not have the same effect. Indeed it seems to me that the rule applies equally in both cases. The decree was not a lien because it was not docketed. If the purchaser at the master's sale had received a deed, he would have had an equivalent for the lien of the mortgage in a title relating back to the date of the mortgage, and founded upon it. He would however, in that case, stand in the light of a grantee of the mortgagor, and not of a creditor having a lien. I think also, the mortgage in this case, and the decree entered upon it, were neither of them a lien; for the reason that the latter was satisfied by a sale of the mortgaged premises. This has been repeatedly held in cases of sales of land on judgments: and I see not why it should not apply to sales upon decrees. (2 *Wend. Rep.* 298. 4 *Coven's Rep.* 136. 5 *Hill's Rep.* 229. 10 *Paige's Rep.* 254.) 2. McAlister's mortgage never was a lien upon the whole premises sold by the defendant. In case of a judgment creditor, this would make no difference, as already shown by reference to the 53d section of the act. But a creditor by mortgage never had a right to redeem, either as grantee or creditor, until it was given to him by the act of the 26th of May, 1836. (*Sess. Laws of 1836, ch.*

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525, p. 793.) By that act it is provided that a creditor by mortgage on real estate, his assignee, &c. shall have the same right to acquire the interest of the purchaser as is given to a judgment creditor, by section fifty-one of the article of the revised statutes relative to executions; and on acquiring such interest shall be subject to all the provisions of that article in relation to the rights of other creditors as were then applicable to judgment creditors by said article. Section 51 of the revised statutes, referred to in the act of 1836, so far as respects this question, is substantially like the 3d section of the act of 1820. (*Sess. Laws of 1820, ch. 184, p. 167.*) Under the last mentioned act, it was held by the supreme court in *Erwin v Shriver*, (19 *John. Rep.* 379,) and in *Huntington v. Forkson*, (6 *Hill's Rep.* 149,) that the lien of the redeeming creditor must extend to the whole of the premises sought to be redeemed. If a mortgage creditor seeks to redeem under the act of 1836, his mortgage must be "*a lien and charge upon the premises sold,*" in order to "*have the same right to acquire the interest of the purchaser,*" &c. as is given by the above 51st section, to bring himself within it, and secure the right which it confers. In my opinion that is not done by having a mortgage which is a lien and charge upon a portion of the premises sold; and the act of 1836 does not apply to the cases provided for in the 53d section above referred to.

These views render it unnecessary for me to notice the various other positions taken by the respective counsel upon the argument.

It follows that the relator was entitled to a conveyance from the defendant for the premises sold by him, and that the one given to McAlister was irregular and void.

An order must therefore be entered directing the same to be set aside and cancelled; and that a peremptory mandamus issue directed to the defendant, requiring him to convey the premises in question to the relator; and that the defendant pay the relator's costs, to be taxed.

NEW-YORK SPECIAL TERM, November, 1847. *Edwards*,
Justice.

KEELER vs. KING.

Although a party has a right, as a general rule, to bring a suit upon a prior judgment, still the supreme court has such a control over its own process that it ought not to permit it to be perverted, or used for any improper purposes.

Where a person who has recovered a judgment, brings successive suits thereon, in different courts, without issuing any execution, and he admits that such suits were brought for the purpose of coercing payment of his debt by accumulating costs, the court in which the last suit is brought will grant a perpetual stay of proceedings in all the suits in that court except the first.

A plaintiff will not be allowed to make use of the costs in the suit by way of penalty, in order to compel the defendant to pay his debt.

It appeared by the affidavits submitted to the court, that in the month of May, 1846, the plaintiff in the above suit recovered a judgment in the superior court of the city of New-York for \$206,87. That shortly afterwards, he brought a suit on that judgment in the court of common pleas for the city of New-York, and recovered a second judgment. That he then brought another suit on the same judgment, in the same court, and recovered a third judgment. That he afterwards brought a suit on the third judgment in the supreme court, and on the 9th of October, 1846, recovered another judgment; and that he afterwards brought four successive suits in the supreme court, each founded on the previous judgment; and that he has recovered judgments in all of them. The last judgment amounted to \$420,75. The attorney for the plaintiff, in his affidavit, set forth a letter, written by him to the defendant, in which he stated that it was his intention to continue suing until the defendant should pay the debt. The attorney also stated that all the suits had been brought by the authority of the plaintiff; and that they had been brought for the purpose of enforcing payment of the debt, and not for the purpose of making costs.

H. Ketchum, for the defendant, moved for a perpetual stay of proceedings upon all the judgments recovered in this court, except the first.

Keeler v. King.

S. W. Niles, contra, cited 9 *Cowen*, 26 ; 1 *Hill*, 645 ; 20 *John*. 342.

EDWARDS, J. The right to sue upon a judgment, before issuing execution, has, undoubtedly, been recognized by this court. And, as the law formerly stood, there were cases in which a suit in this court, upon a judgment of a court of limited jurisdiction, was necessary for the purpose of obtaining a more extended lien. There may also be cases in which a suit upon a prior judgment in this court would be proper, in order to protect the rights of the plaintiff. But no such reason exists in the cases before us. On the contrary, the plaintiff's attorney admits in his affidavit, that the successive suits were brought for the purpose of coercing payment of the plaintiff's debt, by accumulating costs.

Without denying the right of the plaintiff, as a general rule, to bring a suit upon a prior judgment, still, this court has such a control over its own process, that it ought not to permit it to be perverted, or used for any improper purpose. It, certainly, never could, with any regard to its own dignity, allow its proceedings to be prostituted to the mere purpose of increasing the costs of the attorney. It is true that, in these cases, the attorney disclaims any intention of accumulating costs for his own personal advantage ; but he avows that his object is to use the costs by way of penalty, in order to compel the defendant to pay his debt. Even in this point of view, I consider the plaintiff's proceedings unwarranted. This court refuses to enforce a penalty ; although it is agreed upon by the parties : and, even in the case where a sum is fixed upon as liquidated damages, if it appears, in fact, to be a penalty, the court will not enforce its payment. If it will not enforce a penalty which has been agreed upon by the parties, it, certainly, ought not to sanction one of so odious a character as that which the plaintiff has endeavored to enforce in the suits in question.

An order must be entered for a perpetual stay of proceedings in all the suits in this court, except the first, and that the plaintiff pay to the defendant \$10 costs of this motion.

DUTCHESS SPECIAL TERM, December, 1847. *Barculo*, Justice.

BARNES vs. CAMACK and wife, and others.

The testimony of the wife can never be received against her husband, except in proceedings instituted against him on her behalf.

This rule holds not only during the coverture, but also continues to apply after a dissolution of the marriage contract, as regards transactions which took place previous to such dissolution.

The only safe and correct practice is, to adhere to the rule that whatever passes between the husband and wife, in confidence, shall forever remain sacred.

Where a mortgage is cancelled by the mortgagee, and discharged of record, without actual satisfaction, at the request of the mortgagor and in consequence of his fraudulent representations, and a new mortgage is substituted in its place;—the mortgagor concealing from the mortgagee the fact that, intermediate the date of the cancelled mortgage and the giving of the substituted security, he has given to a third person a mortgage upon the same premises, which has been recorded—a court of equity has the power either to revive the cancelled mortgage, or to give the substituted security a priority over the mortgage given to such third person.

A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice.

A subsequent mortgagee who takes his conveyance with notice of a prior mortgage upon the premises, and who subsequently acquires a superior legal title to the premises, by the cancelling of the prior mortgage through mistake, without having parted with any property or right, or placing himself in any worse condition in consequence of the cancelling of the prior mortgage, is not a bona fide mortgagee within the meaning of the recording act and the adjudged cases; and he will not be permitted by a court of equity to retain such superior legal title, to the injury of the prior mortgagee.

Where the legal rights of parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights, acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.

IN EQUITY. On the 3d of May, 1841, the defendants Moses Camack and wife executed a mortgage to the plaintiff, to secure \$300, upon a lot of land in Newburgh, thirty feet front and rear, and ninety feet deep. On the 6th of September, 1841, the same parties executed a mortgage to the defendant Brown for \$1000, upon a portion of the same premises, and upon other lands. On the 1st of March, 1842, Moses Camack applied to the plaintiff to release from her mortgage a strip of ten feet on the westerly side of the lot mortgaged to her, alleging as a rea-

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son, that he had sold it to his brother James Camack and given a warranty deed. He informed her also, that the proper and only mode of doing the business was to cancel the first mortgage and take a new one upon the remaining portion of the lot, which he assured her would preserve her lien perfect as it then was upon that portion of the lot. She believing his statements, and being ignorant of the mortgage to Brown, acknowledged satisfaction of the first mortgage, and took another upon the remaining twenty feet, for the same sum, dated March 1st, 1842.

The plaintiff insists that she never intended to release the twenty feet; and that, if Brown's mortgage is preferred to hers, she will lose her debt. The cause came to a hearing on the bill and the separate answer of Moses Camack and John Brown, and upon proofs.

M. I. Townsend & J. W. Brown, for the plaintiff. 1. The plaintiff's mortgage was the oldest lien on the premises in question; and unless the same is to be regarded as extinguished or satisfied in equity, it is still entitled to priority over all the other incumbrances. It is neither satisfied nor extinguished, even if no fraud has been practised on the plaintiff. (1 *Cowen*, 125. 1 *Root's Rep.* 500. 2 *New Hamp. Rep.* 525. 9 *Mass. Rep.* 242. *Roll. Abr.* 470. *Cro. Car.* 86. 8 *John. Rep.* 54. *Bac. Abr. Extinguishment, D.* 20 *John. Rep.* 407. 11 *Id.* 513, 16, 17. 4 *Har. & McHenry*, 482. 6 *Coke*, 44, *Higgins' case.* 6 *Jurist Rep.* 987. 2 *Harr. Dig.* 3903.) 2. The certificate of satisfaction of the plaintiff's mortgage having been obtained by the defendant Camack by fraud and misrepresentation, as to all persons except bona fide purchasers, the rights of the parties are to be settled in the same manner as if the mortgage had never been cancelled of record. (*Livingston v. The Peru Iron Company*, 2 *Paige*, 390. *Champlin v. Laytin*, 6 *Id.* 189. *Livingston v. Hubbs*, 2 *John. Ch. Rep.* 512.) 3. If no actual fraud has been perpetrated upon the plaintiff, the representations made by Camack as to the mode of transacting the business led her to do what she did not intend to do; and she is for that reason entitled to relief. (2 *Cowen & Hill's*

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Notes to Phil. Ev. 1485, note 998. 1 *Story's Eq.* 131 to 160. 18 *Wend.* 409. *Champlin v. Laytin*, 6 *Paige*, 189.) 4. John Brown the defendant, whose mortgage bears date September 6th, 1841, is not a bona fide purchaser as against the plaintiff in this cause. He took his mortgage with actual notice. His mortgage is therefore not entitled to a priority, but is in equity to be postponed to the mortgage of the plaintiff dated May 3d, 1841. (*Padgett v. Lawrence*, 10 *Paige*, 170, 180. *Dickerson v. Tillinghast*, 4 *Id.* 215. *Wardell v. Howell*, 9 *Wend.* 170. *Rosa v. Brotherson*, 10 *Id.* 85. *Coddington v. Bay*, 20 *John.* 637. 2 *Story's Eq.* 590, 591, n.) 5. The complainant is entitled to a decree declaring that the certificate of satisfaction of her mortgage of the 3d of May, 1841, was obtained by fraud and misrepresentation, and that such certificate is of no effect as against the defendants; and for a foreclosure and sale upon the mortgage of 3d of May, 1841, as to the twenty feet.

D. B. Boice, for the defendants. 1. The plaintiff cannot set up any acts of fraud or misrepresentations on the part of Moses Camack to induce her to discharge her mortgage, to which acts J. Brown was not a party, and of which he was ignorant; because (1) Even if true, such acts (if the certificate of satisfaction should be invalid) would be prejudicial to the rights of the defendant Brown. The equities are equal, and the law must prevail. (2) The plaintiff relied upon the statements of Moses Camack personally, and by her own act (if the satisfaction was invalid) misled the defendant John Brown, and prejudiced his rights. Her intentions do not alter the case. (*See Ferris v. Hendrickson*, 1 *Edw. Ch. Rep.* 133.) 2. The plaintiff received a valid consideration for the satisfaction of her first mortgage; and the certificate of satisfaction cannot be set aside nor declared void, except upon direct proof of fraud, or undue influence exercised by the party to be benefitted. The rights of third persons cannot be affected by it. Fraud cannot be presumed; it must be proved, and expressly found. (*Clark v. White*, 12 *Peters' Rep.* 178. *Barton v. Rushton*, 4 *Dess.* 373. *Es's*

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of *Chouler v. Smith*, 3 *Id.* 12.) 3. The answer of the defendant Moses Camack, so far as it is responsive to the bill, is evidence for John Brown, and cannot be overthrown except by the testimony of two witnesses. (*Daniel v. Mitchell*, 1 *Story*, 172. *Neville v. Demeritt*, 1 *Green's Ch. Rep.* 322. *Lenox v. Prout*, 3 *Wheat. Rep.* 527.) 4. The proofs do not sustain the charges of fraud, or misrepresentations made by Camack to the plaintiff to induce her to acknowledge satisfaction of her mortgage, as alleged in the bill.

BARCULO, J. The first question arising in this case is, whether the testimony of Hannah Camack was properly received. The objection was distinctly taken before the examiner, and, although not insisted on at length on the argument, it is undoubtedly a valid one, according to well settled principles. The witness was the wife of the defendant Moses Camack, and was divorced from him, by a decree of the court of chancery made on the 28th day of May, 1846, for the adultery of the husband committed in the year 1843. Her testimony relates to occurrences which took place in the years 1841 and 1842, while she was living with her husband. When the objection was taken before the examiner, the decree was produced, and thereupon the testimony was taken.

The authorities, I think, establish the proposition fully, that the testimony of the wife can never be received against her husband, except in proceedings instituted against him on her behalf. This rule holds, not only during the coverture, but also continues to apply after a dissolution of the marriage contract, as regards transactions which took place previous to such dissolution. Mr. Phillipps thus lays down the law on this subject: "This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded, if the marriage had continued. This, as Lord Ellenborough has said, is on the

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ground that the confidence, which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence which once subsists, ever afterwards inviolable in courts of law." (1 *Phil. Ev.* 83. See also *Cowen & Hill's Notes*, 1554; *State v. Phelps*, 2 *Tyler's Rep.* 374.) In *Ratcliff v. Wales*, (1 *Hill*, 63,) Bronson, Justice, in delivering the opinion of the court, distinctly recognizes this doctrine. Indeed, a contrary rule would be productive of intolerable evils. If the law were that a divorce *a vinculo matrimonii* would admit the wife to take the stand as a witness, and allow her to disclose all the transactions of the husband's life which had been intrusted to her in the days of unbounded faith, it would tend to impair that mutual confidence between man and wife which society requires, and which the law ought to protect. Designing men might even become instrumental in procuring a divorce, for the very purpose of using the testimony of the wife to penetrate the secret affairs of her husband. The only safe and correct practice is, to adhere to the rule, that whatever passes between husband and wife in confidence, shall forever remain sacred. The testimony of the wife, therefore, must be laid out of this case. Fortunately for the plaintiff, the main facts are substantiated by other witnesses.

The testimony shows very clearly, that her son in law, Moses Camack, by gross and fraudulent misrepresentations, induced the plaintiff to execute a satisfaction piece, on which her first mortgage was cancelled of record; and the second mortgage, of March, 1842, was substituted in its place. By this operation the mortgage of the defendant Brown, having been given in September, 1841, would stand first upon the record and be entitled to priority, unless this court can revive the first mortgage of the plaintiff, or give her second mortgage priority over Brown's. I have no doubt of the power of the court to do either, if the case will warrant its interference.

It is a familiar doctrine, that a court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice. (*Forbes v. Moffatt*, 18 *Ves.* 384.

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Starr v. Ellis, 6 John. Ch. Rep. 393. *Neville v. Demeritt*, 1 Green's Ch. Rep. 321.) In *Miller v. Wack*, (*Saxton's Ch. Rep.* 204,) the chancellor of New-Jersey held, that the *simple cancellation* of a mortgage on the record was not an absolute bar, unless there had been actual satisfaction; that the cancelling is evidence sufficient to sustain the rights of all persons interested, unless the party setting up the cancelled mortgage should shew satisfactorily some *accident, fraud or mistake*. (See also *Jackson v. Stockholm*, 1 Cowen, 125; *Cornell v. Lamb*, 20 John. 407.) Hence there is no difficulty in reviving the first mortgage as against the mortgagor; it having been cancelled by his fraud, and without any actual satisfaction. The principal question is, whether the plaintiff is entitled to a decree as against Brown.

Brown does not appear to have been a participator in the fraud. The facts of the case entirely acquit him of any actual connection with the misrepresentations of Camack. Nevertheless the plaintiff was induced to acknowledge satisfaction of her first mortgage by those misrepresentations, and under a mistake of *facts* in regard to the existence of any other incumbrances. Is the defendant Brown in a situation where he can be permitted to take advantage of the mistake or fraud?

The plaintiff's first mortgage was given some months before Brown's. It was on record, and he also had actual notice of it, when his mortgage was executed. Six months after his mortgage was taken, the first mortgage was cancelled. He has not loaned any money, or done any act on the faith or strength of the cancellation. He is not, therefore, a *bona fide* mortgagee within the meaning of the recording act and the adjudged cases. In *Dickerson v. Tillinghast*, (4 Paige, 221, 2,) the chancellor remarks, "so if a subsequent purchaser merely takes the legal estate in payment of, or as security for, a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse condition than he would have been in, if he had received notice of the prior equitable title, or lien, previous to his purchase, the court will not permit him to retain the legal title he has thus obtained, to the injury of another."

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In like manner Brown, not having parted with any property or right, nor having placed himself in any worse condition, in consequence of the plaintiff's having cancelled her first mortgage, but having acquired a superior legal title by reason of her mistake, this court cannot permit him to retain it, to the injury of the plaintiff; but must give preference to the equity of the latter. (*Padgett v. Lawrence*, 10 *Paige*, 170. *Millspaugh v. McBride*, 7 *Id.* 509. *Daniel v. Mitchell*, 1 *Story's Rep.* 172. *McCarthy v. Decaix*, 1 *Russ. & Mylne*, 614.)

Hyde v. Tanner, (*ante*, p. 75,) was in some respects similar to this case. In that case a mortgage to the plaintiff had been given by an intestate, and after his death it was cancelled and a new mortgage taken from the heir, on the same premises, in its stead. This court set up the old mortgage and gave it priority, as against the creditors at large of the deceased, upon the ground that the first mortgage had been cancelled under a mistake of fact in regard to the existence of debts beyond the amount of assets; and that the creditors had not, in any way, been prejudiced by the cancellation. The difference between that case and the present is, that in the former the mistake was *inferred*, here it is *proved*. The principle on which both are decided, and which runs through all cases of this description, is, that when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons.

The plaintiff is therefore entitled to a decree, declaring the satisfaction piece void for fraud and mistake, and for the foreclosure and sale of the mortgaged premises under her two mortgages. The proceeds of the sale are to be first applied in payment of the debt and costs of the plaintiff. The surplus, if any, is to be applied towards the payment of the defendant Brown's debt.

SAME TERM. *Before the same Justice.*1. 300
127. 604.

CUNNINGHAM vs. KNIGHT.

An infant *feme covert* cannot bind herself by deed, so as to bar her right of dower.

Where, in a suit for the recovery of dower, a former owner of the land, who has conveyed the same, by warranty deed, to the person from whom the defendant derives his title, is introduced as a witness for the defendant, a release executed by the defendant to the witness is good and valid, and removes the objection to his competency on the ground that he will be liable over to his grantee, or to the defendant, in case of a recovery by the plaintiff in the suit for dower.

It is sufficient if, at the time of testifying, the witness is disinterested. It is not a question whether he may, by possibility, or in the course of events, become interested.

A covenant of warranty runs with the land, so long as it remains unbroken.

When it is broken by an eviction of the purchaser, or his assignee, a right of action accrues to him to recover the consideration money, and interest. It then takes the character of a chose in action, and can be released by the covenantee, or his assignee.

Where, upon the purchase of land, a deed is executed by the vendor, and a mortgage upon the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously, and that the mortgage was intended to secure the purchase money, although given to a third person, instead of the vendor, by the direction of the latter.

Where the husband has only an instantaneous seisin of land—as where he takes a conveyance thereof and gives back a mortgage for the purchase money—the wife is not entitled to dower therein.

The section of the revised statutes declaring that, where lands are mortgaged by the husband previous to his marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged, as against every person except the mortgagee and those claiming under him, is not applicable to the case of a mortgage for the purchase money.

Where land is sold, and a mortgage for the purchase money is given by the purchaser to a third person, by the direction of the vendor, the latter is to be regarded in equity as the real mortgagee.

Distinction between an *exception*, and a *reservation*, in a deed.

IN EQUITY. The bill in this cause was filed to recover dower in certain lands in Orange county. It set forth that the plaintiff, on the 9th of November, 1814, was married to James Cunningham, who was then seised of the premises, consisting of about 100 acres; that on the 24th of May, 1815, she joined with her husband in a conveyance thereof to one James Smith,

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the plaintiff being at that time an *infant*; that her said husband died in 1832, leaving her entitled to her dower; and that the defendant was in possession and refused to assign her dower. The bill required an answer on oath from the defendant. The answer stated that on the 3d day of May, 1814, James Smith was the owner of the premises, subject to the right of one Peter Bush to have a conveyance of seven acres, under a contract between them, and that said James Cunningham made an agreement with Smith and Bush to purchase the whole premises for \$3750, of which \$2875 was to be paid to Smith for the ninety-three acres, and \$875 to Bush for the seven acres; and that Cunningham should execute his bond and mortgage to Bush, for the benefit of the vendors, upon the lands so sold, and upon certain other lands, to secure the payment of the whole purchase money with interest, one year from that date; and that Smith should continue in the actual possession of the ninety-three acres until the payment of said sum of \$2875, which possession should be in lieu of interest: that in pursuance of that agreement, Smith, on the 3d of May, 1814, executed a deed to Cunningham for the one hundred acres, and the latter executed a bond and mortgage to Bush to secure the whole \$3750; that Smith remained in possession until May, 1815, when Cunningham, being unable to pay, reconveyed the premises to Smith by the deed dated 24th of May, 1815, which was executed by Cunningham and wife, and received by Smith and Bush, in satisfaction of the purchase money. The answer admitted the death of James Cunningham in 1832, and that the plaintiff had demanded her dower, but denied that she was entitled to any, and insisted that if she was entitled, her right was subject to the payment of the principal moneys mentioned in said mortgage with interest. The answer also admitted that the defendant was in possession of all except ten acres, claiming to hold under Smith by mesne conveyances, as a bona fide purchaser.

The proofs taken show 1st. A warranty deed from Smith to James Cunningham, dated May 2d, 1814, for the consideration of \$5000, acknowledged the 3d, and recorded *the 5th of May, 1814, at 5 o'clock P. M.* 2d. A mortgage from James Cun-

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ningham to Peter Bush, dated 3d of May, 1814, to secure \$3750, covering the 100 acres in question and also 195 acres in addition, acknowledged the 3d and recorded *the 5th of May, 1814, at 5 o'clock P. M.* 3d. A certificate signed by James Cunningham, dated May 3d, 1815, by which he certifies that he will "transfer the land I bought of Mr. James Smith to him according to the last bargain agreed on by said Smith, Peter Bush and Abner Cunningham, and give at this time possession of all the land in my possession that I got of him the said Smith, and at or before ten days from this give possession of all the buildings on said possessions, to which I set my hand." 4th. A warranty deed from James Cunningham and wife of the 100 acres, "reserving and exempting seven acres from the southwesterly part of said piece of land this day conveyed by James Cunningham, the said party of the first part, to Wm. Bush," dated May 24th, 1815. 5th. A certificate of the clerk of Orange county, showing that the mortgage so given to Bush was discharged as to the 100 acres, excepting about eight acres, by his satisfaction piece acknowledged and filed on the 27th of January, 1816, and that the residue of said 100 acres was discharged in like manner, on the 6th of May, 1816, by a satisfaction piece acknowledged the 26th of April, 1816.

The defendant's counsel admits that the age of the plaintiff, her marriage, and the death of her said husband, are as stated in the bill. The defendant called as a witness Samuel Smith, a son of James Smith, who proved the agreement for the purchase of the 100 acres by Cunningham of Smith and Bush, substantially as stated in the answer; Cunningham agreeing to give the mortgage to secure the whole amount of the purchase money. The mortgage was given to Bush at the instigation of James Smith, who was father in law of Bush: the latter agreeing to give the former "obligations to secure him." James Smith remained in possession until the spring of 1815, when Cunningham being unable to pay, made a proposition to give up the property. Cunningham told James Smith "he would transfer the farm back to him again just as he had it before." James Smith said "he would think it over and let him know

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what he would do." At a subsequent day the parties again met, when Cunningham agreed to convey the 93 acres back to Smith, to satisfy and pay \$2875 of the mortgage given to Peter Bush, being the purchase money for that 93 acres. It was stated at every one of these meetings that no money had been paid by Cunningham for the land. At this last meeting Cunningham executed the certificate dated May 3d, 1815. This witness further testified, "I succeeded my father in the possession of the premises, and sold to David Webb, and Webb sold to William Knight."

J. Wyman Jones, for the plaintiff. I. The deed of conveyance from James Cunningham and the complainant, of the 24th of May, 1815, is inoperative and void as against the complainant. An infant *feme covert* cannot bind herself, by any deed or contract, either at law or in equity, except under the sanction of the court of chancery, or in cases provided for by the statute. (*Jones v. Todd*, 2 *J. J. Marsh.* 361. *Sandford v. McLean*, 3 *Paige*, 117, 121.) II. The proof offered by the defendant, that the mortgage to Peter Bush was given by James Cunningham to secure the purchase money of the land bought of James Smith, is inadmissible; and if admitted, is insufficient to establish the point. 1. The witness Samuel Smith is interested. A release from the defendant does not destroy his liability upon his covenant of warranty. 2. The testimony is introduced to contradict sealed instruments. (*Webb v. Rice*, 1 *Hill*, 608; *S. C.* 6 *Id.* 219. *Stevens v. Cooper*, 1 *John. Ch.* 429. 1 *Phil. Ev.* 564, notes 1429, 1434.) III. The conveyance of 24th of May, 1815, to James Smith, was not made to satisfy the mortgage to Peter Bush. 1. The testimony does not show any thing more than an *executory agreement* to this effect. 2. This mortgage was satisfied at two different times; as to a portion, 27th of January, 1816; and as to residue, 26th of April, 1816. IV. The complainant is entitled to her dower, notwithstanding the mortgage to Peter Bush, as against the defendant and all persons except Bush and those claiming under him. (1 *R. S.* 733, 1st ed. 740, § 4.) James Smith, under

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whom the complainant claims, never was an equitable mortgagee. He took obligations of P. Bush for his share of the mortgage. V. This deed of 24th of May, 1815, reserves and excepts seven acres of this lot, which the defendant admits he is in possession of, but to which he sets up no title whatever; and the complainant's right to dower in this portion of the farm is therefore undisputed. VI. The two acres which the defendant denies that he is in possession of, is not a part of the seven acres reserved in the deed from the complainant to James Smith. VII. The complainant is entitled to damages for withholding her dower in the seven acres of which her husband died seised. (1 R. S. 734, 1st ed. 742, § 19. *Russell v. Austin*, 1 *Paige*, 194.) VIII. The complainant is entitled to costs. 1. The court of chancery has concurrent jurisdiction with courts of law, in suits for assignment of dower. (*Badgley v. Bruce & Halsey*, 4 *Paige*, 98. *Russell v. Austin*, 1 *Id.* 194.) 2. The complainant was unable to proceed at law, as she could not pay the costs of the former suit commenced without her knowledge or consent. (*Swain v. Perine*, 5 *John. Ch.* 488.)

John W. Brown, for the defendant. 1. James Cunningham, before his intermarriage with the complainant, having executed a mortgage for the whole of the purchase money, simultaneous with the execution of the deed to him by James Smith, until payment of the amount secured by the mortgage, he had no such seisin as would entitle the complainant to her dower. (*Stow v. Tift*, 15 *John. Rep.* 459. *Jackson v. Dewit*, 6 *Cowen*, 316. 4 *Kent's Com.* 44, 45.) 2. By the agreement, James Smith was to continue in the possession of the premises until Cunningham paid the purchase money. The mortgage to Peter Bush to secure the payment of the purchase money, coupled with Bush's interest in the premises, and the agreement that Smith should retain the possession, was to all intents and purposes a mortgage to James Smith. 3. James Cunningham obtained the possession for two or three weeks by a forcible entry, and in violation of the agreement. He therefore never was in the lawful or rightful possession of the property, and the con-

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tract of sale was never consummated. 4. Peter Bush, the mortgagee, held the mortgage for the benefit of James Smith, who was in fact the real mortgagee. Bush was present at, and a party to, the agreement by which the mortgaged premises were conveyed to James Smith in satisfaction of the mortgage debt. This conveyance operated as a release of the equity of redemption to James Smith, who was in fact the mortgagee. 5. James Smith having re-entered and resumed the possession as mortgagee or under the mortgagee, with a conveyance of James Cunningham's equity of redemption, (if he had any,) and the defendant William Knight deducing a regular title from James Smith, the complainant is not entitled to be endowed of the one third part of the premises until she pays, or offers to pay, a due proportion of the mortgage debt. (*Van Dyne v. Thayer*, 19 *Wend.* 164; *S. C.* 12 *Id.* 234. *Bell v. Mayor of New-York*, 10 *Paige*, 50, 67. 4 *Kent's Com.* 44, 45. *Swain v. Perine*, 5 *John. Ch.* 482.) 6. The proof shows that James Cunningham, the husband of the complainant, never paid any part of the purchase money. In equity, therefore, he never had any seisin or property in the premises in question. 7. The admissions and declarations of the husband are competent evidence in bar of the widow's claim for dower, as they would be in bar of her title as heir or grantee. (*Van Dyne v. Thayer*, 14 *Wend. Rep.* 233.)

BARCULO, J. There can be no doubt of the correctness of the position contained in the plaintiff's first point, that the deed of the 24th of May, 1815, having been executed by the plaintiff when an infant *feme covert*, does not bind or affect her, by virtue of such execution. The first question to be considered, therefore, is whether the testimony of the witness Samuel Smith was inadmissible, on the ground of interest, as contended for by the plaintiff's counsel. No objection was made before the examiner, to the testimony on this ground. Notwithstanding that, however, a release from the defendant to the witness was executed. But the counsel insists that the interest was of such a nature that it could not be released, and that, therefore, the

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objection may be raised at the hearing. The fact upon which the objection rests is, that the witness conveyed the premises by warranty deed to David Webb, who in like manner conveyed to the defendant. From this fact it is argued that Webb is liable on his covenant to the defendant, and that the witness is liable over to Webb, in case the plaintiff should recover in this suit; and that the defendant's release cannot discharge the witness from his liability to Webb. The answer to this proposition is, that it is sufficient, if *at the time of testifying* the witness is disinterested; and it is not a question, whether he may, by possibility, or in the course of events, become interested. I am also inclined to think that the release would be a defence of which Webb could avail himself in an action by the defendant. It is further contended that the covenant runs with the land, and that therefore the witness must be liable to any person who may at any time come in, as immediate grantee of the defendant, or by subsequent conveyances. To this objection the answer is, that the covenant runs with the land so long as it remains unbroken. When it is broken by an eviction of the purchaser or his assignee, a right of action accrues to him to recover the consideration money and interest. (*Kane v. Sanger*, 14 John. 89. *Withy v. Mumford*, 5 Cowen, 137.) It then takes the character of a chose in action, and can be released by the covenantee or his assignee. At the time of giving the release the defendant had a contingent right of action against the witness. If he should be evicted by the result of this suit, that right would become absolute, and would be forever discharged by this release. The covenant could never pass to any subsequent purchaser. If, however the recovery should be in favor of the defendant in this suit, then the witness would probably remain liable on his covenant, to subsequent owners: but that very liability would rather tend to interest him against the defendant, inasmuch as a recovery against the defendant, after the giving of the release, could not affect the witness injuriously, but would forever terminate his liability. This question has been twice decided in the supreme court of Connecticut. In the case of *Abby v. Goodrich*, (3 Day, 433,)

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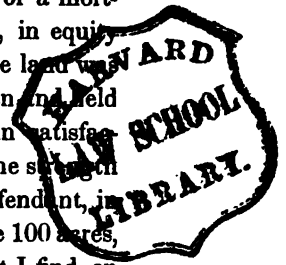
the court held that the interest could not be released. But in *Clark v. Johnson*, (5 Day, 373,) the precise point was determined in favor of the competency of the witness. The case of *Ford v. Walsworth*, (19 Wend. 334,) involved the same principle. In that case Beach conveyed to Rowley with covenants for quiet enjoyment: Rowley conveyed to the wife of the defendant. On the trial, the defendant offered Beach as a witness, who being objected to, the defendant executed a release. The circuit judge still rejected him. The supreme court held that the release was sufficient to remove the incompetency, and, on that and other grounds, ordered a new trial.

The testimony of Samuel Smith being admitted, I think it establishes, in connection with the documentary evidence, the fact, that the mortgage was given to Peter Bush for the purchase money, and that the reconveyance by Cunningham, on the 24th of May, 1815, was given and received in satisfaction of the mortgagee's debt, to the amount of \$2875. The deed and mortgage being acknowledged and recorded at the same time, raise, of themselves, a presumption that they were simultaneous acts, and that the latter was given for the purchase money, although given to Bush instead of Smith. (*Kettle v. Van Dyck*, 1 Sandf. Ch. Rep. 76.) These facts raise the next question: whether James Cunningham had such a seisin of the premises as would entitle the plaintiff to her dower. Upon this point the authorities are full and conclusive. Kent in his commentaries, (4 Kent, 45,) lays down the rule thus: "If the mortgage was executed on a purchase before marriage, and the husband releases the equity after the marriage, the wife's right of dower is entirely gone: for it never attached, as the mortgage was executed immediately on receiving the purchaser's deed." The case of *Jackson v. Dewitt*, (6 Cowen, 316,) is precisely in point. There Bruyn conveyed to Depuy, and took back a mortgage for the purchase money. Depuy then married Catharine Bevier. Depuy afterwards reconveyed to Bruyn for the moneys due on the mortgage. Hixon, the lessor of the plaintiff, derived title by several mesne conveyances from Bruyn. After Depuy's death, dower was assigned to his widow by the surrogate. She

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brought ejectment in the supreme court and recovered against Hixon. (17 *John*. 123.) Dewitt was in possession as her tenant. The court held that the widow was not entitled to dower; upon the ground that the husband had an instantaneous seisin only, and therefore the widow was never entitled to dower, and accordingly ordered judgment for the plaintiff. (See also *Stow v. Tift*, 15 *John*. 458.) The case of *Jackson v. Dewitt* is not to be distinguished from the present. It is proper, however, to notice one or two other points taken by the plaintiff's counsel on the argument.

1. He contends that under the statute (1 *R. S.* 740, § 4,) the widow is entitled to dower as against every other person, except the mortgagee and his assigns; and that therefore the defendant, claiming under Smith, cannot avail himself of this defence, as the mortgage was given to Bush. That statute does not change the law, nor is it applicable to the case of a mortgage for the purchase money. I think, however, in equity Smith must be regarded as the real mortgagee. The land was sold by him, and the mortgage, by his direction, taken and held by Bush. The property was reconveyed to Smith in satisfaction of the mortgage, and the mortgage cancelled on the strength of that conveyance. 2. It is contended that the defendant, in his answer, admits himself in possession of the whole 100 acres, while the deed to Smith conveys but 93 acres. But I find on examining the pleadings, that the bill charges that Cunningham conveyed to Smith, with certain *reservations*, the whole 100 acres. This the answer admits. The fact is thus established that the whole 100 acres were reconveyed to Smith with certain *reservations*. Now although when produced the deed shows an *exception* of seven acres, the plaintiff cannot avail herself of that discrepancy, as there is a material difference between an exception and a reservation. An *exception* is something taken out of that which is before granted, by which means it does not pass by the grant, but is severed from the estate granted. A *reservation* is something issuing out of the thing granted, and not a part of the thing granted. (*Cruise's Dig. tit. 32, Deed, ch. 3*) In *Shepherd's Touchstone* the distinction



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is thus made: "This [a reservation] doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before." (*See also 4 Kent's Com.* 468.) The defendant has doubtless been drawn into the mistake of admitting more than he intended, and more than is true, by the want of precision in the language of the bill.

Again; there is another fatal objection to this part of the plaintiff's argument. If the exception in the deed is considered it excepts seven acres "this day conveyed by James Cunningham to William Bush." The evidence in this case, I think, fully warrants the conclusion, that the conveyance of these seven acres to William Bush, of which this recital is evidence binding the plaintiff, (*Cowen & Hill's Notes*, 160,) was in satisfaction of that part of the mortgage moneys due to Peter Bush. In this view of the case the plaintiff could not be entitled to dower in the seven acres, whether they were in the defendant's possession or not.

Upon the whole, I think the plaintiff has failed to make out a case entitling her to dower, in any part of the premises. The bill must be dismissed with costs.

SAME TERM. *Before the same Justice.*

SEARS and others vs. SHAFER and SHAFER.

Where a person interested in remainder in real estate devised to others for life, voluntarily, and as a free gift, conveys her interest to the tenants for life, from a sense of justice, and to carry into effect the supposed intentions of the testator, such conveyance is valid, if executed by the grantor freely and understandingly, with a full knowledge of her rights and interests, and of the consequences of her act.

The opinions of witnesses, as to the mental capacity of a grantor in a conveyance,

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or as to his being subject to the control of others, are inadmissible as evidence. The only legal testimony on such subjects—except in cases of witnesses to a will, or on questions of science—consists of the acts and declarations of the parties evincing a want of capacity or subjection to influence.

It is for the court, and not the witness, to form an opinion from the facts.

Where a gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of an easy temper and yielding disposition, liable to be imposed upon, a court of equity will look upon such a gift with a very jealous eye, and will very strictly examine the conduct and behavior of the person in whose favor it is made. If it can discover that any acts, or stratagems, or any undue means, have been used by him to procure such gift; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give the latter an undue influence over the former; if there be the least *scintilla* of fraud, the court will interpose.

The principle upon which a court of equity grants relief against conveyances obtained by fraud, or undue influence, is applicable to all cases where the relation between the parties gives one a controlling influence over the other.

The fact of a deed having been prepared at the sole instance of the grantee, and not shown to the grantor, or mentioned to him, until the same was presented for execution, is a suspicious circumstance, and raises a presumption of fraud. But it is not decisive, and may be rebutted by proof that there has been no abuse of confidence by the grantee.

It is incumbent upon a party who sets up a voluntary conveyance executed under suspicious circumstances, to show affirmatively that the transaction was fair and honest.

IN EQUITY. Dedrick Shafer, of the county of Orange, grandfather of the plaintiffs and defendants, died in 1807, leaving his last will and testament, by which he devised to each of his three sons, Dedrick, Daniel and Frederick, a farm, generally, without words of limitation, or inheritance, and gave to his daughter Elizabeth £720, to be put out by the executors, and the interest paid to her annually. The three sons were appointed executors, and, soon after their father's death, took upon themselves the execution of the will. On the 5th day of February, 1820, Elizabeth, being then the widow of Benjamin Sears, deceased, executed to each of her brothers a release of the farm so devised to him, reciting therein that the parties believed that the testator *intended* to devise in fee, but that the terms of the will gave only a life estate, and that the release was designed to give effect to such intentions. Elizabeth died on the 28th of July, 1820, leaving the plaintiffs her children and heirs

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at law, surviving her, some of whom were infants of tender age. The sons are also dead. Frederick died in 1841, and left the defendants his children and heirs at law—having conveyed the premises in question to the defendants respectively, in two parcels, by deed, before his death. In the spring of 1846, the defendants respectively served notices upon the plaintiffs, requiring them to assert their claim to the lands in question, pursuant to the statute for the determination of claims to real estate. The plaintiffs thereupon filed declarations in the supreme court to said claims, and issue was joined thereon. The plaintiffs then filed their bill to obtain a decree setting aside the release so given by Elizabeth to Frederick, on the ground that the same was obtained by fraud and undue influence.

Wm. S. Sears & C. Borland, for the plaintiffs.

S. J. Wilkin, for the defendants.

BARCULO, J. It is a proposition too plain to admit of discussion, that under the devise in his father's will, Frederick took but a life estate in the premises in question. Upon the father's death, therefore, the remainder vested in his heirs at law; of whom Elizabeth was one; and as such, she was entitled to a fourth part of the estate not disposed of by the will. This one-fourth passed to her heirs at law, the present plaintiffs, unless her interest was conveyed by the release dated 5th of February, 1820. The whole case, consequently, turns upon the validity of that instrument.

It is not pretended that, at the time it bears date, Elizabeth was a lunatic or otherwise wholly incompetent to do any legal act. The utmost that is claimed by the plaintiffs' counsel is, that she was greatly weakened and prostrated in body, by disease and pain, and that thereby her mind had become enfeebled and exposed to the action of exterior influences; that she had always lived on terms of friendship with her brothers, and reposed in them the most implicit confidence; and that taking advantage of this position, they had exercised an undue

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influence over her, and procured from her this release, without consideration, and under such circumstances as require this court to pronounce it void.

Before proceeding to examine the main question, it may be proper to notice one point of the argument which was very strenuously urged upon the court, and to which numerous authorities were cited. The counsel claimed that this release, being of a valuable interest in lands, was without consideration, and therefore void. This would undoubtedly be true, if the transaction assumed the aspect of a purchase and sale; but the defendants do not claim to hold as purchasers for a valuable consideration, in the ordinary acceptation of that phrase. They claim that the testator intended to give the land to Frederick, in fee, and was only prevented by an arbitrary rule of law; and that Elizabeth, from a sense of justice, and to carry into effect the intentions of her father, voluntarily, and as a free gift, conveyed her interest to her brothers. If this be so—if she executed this release *freely and understandingly*, with a full knowledge of her rights and interests, and of the consequences of her act, it must stand. "*Stat pro ratione voluntas.*" For, the relations of the parties are such, that a mere gift, by a proper conveyance, would be valid. "Every man may give a part or all of his fortune to the most worthless object in the creation; and the court of chancery never did rescind or annul donations, merely because they were improvident, and such as a wise man would not have made, or a man of very nice honor would not have accepted." (*Shelford on Lunatics*, 268.)

Let us then, in the first place, proceed to inquire into the mental condition of the grantor at the time of signing the release, and see how far it partakes of that character which will justify the court in estimating it as one of the component parts of a case of fraud, requiring relief. Much of the testimony on this point was objected to by the defendants' counsel, and must be rejected and laid out of the case. This is the case as respects all the answers giving the *opinions* of witnesses as to the capacity of Elizabeth, or as to her being subject to the

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control of her brothers. The only *legal* testimony on such subjects, except in case of witnesses to a will, or on questions of science, consists of the *acts* and *declarations* of the parties evincing a want of capacity or subjection to influence. (*Coven & Hill's Notes*, 759.) It is for the court, not the witness, to form an *opinion*, from the facts.) In this case, the witnesses have very freely given their *opinions* on this subject; in many instances, without stating a single fact to sustain them. All such testimony must be disregarded; and the plaintiffs are not to be allowed the costs of taking it, if a decree should go in their favor. In regard to the testimony objected to merely on the ground of its being in answer to leading questions, it cannot be wholly rejected. The rule at law is, that no exception will lie for allowing leading questions to be put by a judge at circuit. Testimony of that description, however, so far as it appears to have been drawn out by the form of the question, will be entitled to much less consideration, than if the questions had been fairly put.

The legitimate evidence establishes the fact that Elizabeth Shafer was naturally of a mild and easy disposition, that she was afflicted with a terrible disease, which had been preying upon her health for a long time. A cancer in the lip was gradually eating into her throat, occasioning great pain, as well as difficulty in eating and conversing. In the fall of 1819 she went to New-York to have an operation performed; but finding it could not be done, she returned greatly depressed in spirits; and from that time was chiefly confined to her room, and a portion of the time confined to her bed, despairing of relief. In the language of a witness, "she appeared to sink down in mind and body." During all this period her pain was so acute as to require the taking of laudanum, by way of anodyne, several times a day. It is quite clear that there is nothing in all this like incapacity. There was no doubt intellect enough remaining to create a valid disposition of her estate, in the absence of other *indicia* of fraud. But the situation of this woman is proper to be taken into consideration, with the other circumstances; as being that of a person much impaired in body and

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somewhat enfeebled in mind ; as one not likely to be vigilant and alert in looking after her pecuniary interests ; as one who would be apt to lean on her relatives and friends for advice and assistance in the management of her estate ; and who, to some extent, would be weak in resisting importunities, and liable to be affected by undue influence coming, as she supposed, from a friendly source. The law recognizes this partial imbecility, and throws its protection around persons thus situated. And, whilst the court disclaims all jurisdiction to interfere on account of the folly or improvidence of an act, done by a person of sound though impaired mind, understandingly and deliberately, yet there are numerous instances in which persons of weak understanding have been relieved, when they appeared to have been imposed upon in their dealings ; and unreasonable purchases and securities which had been obtained from them, have been set aside in their favor, when want of consideration, or the improvident nature of the transaction, has raised a presumption that fraud and misrepresentation were employed. (*Shelf. on Lun.* 267.) When the gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of an easy temper and yielding disposition, liable to be imposed upon, the court will look upon such a gift with a very jealous eye, and will very strictly examine the conduct and behavior of the person in whose favor it is made. If it can discover that any arts or stratagems, or any undue means, have been used by him to procure such gift ; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give him an undue influence over him ; if there be the least *scintilla* of fraud, a court of equity will interpose. (*Gartside v. Isherwood*, 1 Bro. C. C. 560. *Clarkson v. Hanway*, 2 P. Wms. 203. *Bennet v. Vade*, 2 Atk. 325. *White v. Small*, 2 Ch. Cas. 103. *Osmond v. Fitzroy*, 3 P. Wms. 130. *Chesterfield v. Jansen*, 2 Ves. 125. *Lewis v. Pead*, 1 Ves. Jun. 19. *Harding v. Handy*, 11 Wheat. 125. *Portington v. Eglington*, 2 Vern. 189.)

The next circumstance to be considered is, the relationship of the parties. The three brothers were the executors of their

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father's will, and trustees of the legacy bequeathed to Elizabeth. The sister, after the death of her husband, naturally turned to her brothers for counsel and aid in the management of her little property. The evidence shows that they lived on the terms of the closest friendship, and that she always advised with them, or some of them, in regard to her affairs; and had full confidence in their judgment and integrity. The books are full of authorities showing the jealousy with which courts regard transactions between persons connected by fiduciary relations. It is a very common occurrence in the English courts, to set aside deeds and gifts made by a ward to his former guardian, soon after coming of age. (*Hylton v. Hylton*, 2 *Ves. sen.* 547. *Dawson v. Massey*, 1 *Ball & Beatty*, 219. *Aylward v. Kearney*, 2 *Id.* 463.) So also in regard to conveyances from a client to his attorney. (*Welles v. Middleton*, 1 *Conn.* 112. *Wood v. Downes*, 18 *Ves.* 120.) A conveyance to a clergyman by one who confided in him as a spiritual guide, was set aside in *Huguenin v. Basely*, (14 *Ves.* 273.) An agreement by a patient in favor of his physician was also set aside. (7 *Sim.* 539; *S. C. on appeal*, 4 *Mylne & Craig*, 269.)

But the principle is by no means confined to these classes of cases. It is applicable to *all* cases where the relation between the parties gives one a controlling influence over the other. In the language of Sir Samuel Romilly, in *Huguenin v. Basely*, "the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another." As in the case of a wife who insinuated herself into the favor of an old man, and clandestinely obtained from him a conveyance of his estate. (*Hervey v. Hervey*, 1 *Atk.* 564.) And in the case of an agreement made by an uncle, on his death bed, in favor of his nephew. (*Willan v. Willan*, 16 *Ves.* 72.) So when a servant had accompanied a young nobleman on his travels during his minority, to protect him from imposition, and remained with him till he was twenty-seven years of age, and then persuaded him to give him a bond for £1000, the court relieved on the ground of fraud, and decreed the bond to be delivered up, saying that the servant, instead of

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acting agreeably to his trust, had been guilty of imposition ; and that a breach of trust was of itself evidence of the greatest fraud ; because a man, however careful otherwise, was apt to be off his guard when dealing with one in whom he reposed confidence. (3 *P. Wms.* 129.) Upon the same principle, the chancellor of the state of Maryland annulled a deed obtained by a daughter from her mother, in pursuance of a promise made to her father before his death, by "most gross abuse of confidence and by a fraudulent combination." (*Colegate D. Owen's case*, 1 *Bland's Ch. Rep.* 370.)

3. Another fact worthy of consideration is, that the release was prepared at the instigation of Daniel, one of the brothers. He employed an attorney to draw this and two other similar releases—one in favor of each of the brothers—and it does not appear that Mrs. Sears had any interview with the attorney, or knew any thing about the papers, until they were presented for execution. In *Owen's case*, (*sup.*,) the chancellor mentions as a prominent badge of fraud : "The deed was prepared at the sole instance of the defendant. It was never at any time submitted to the consideration of the plaintiff, or in her possession for an instant before its execution." All this is emphatically true in the present case. Shelford thus lays down the rule, page 271. "The fact of a deed having been prepared by the party who takes a benefit under it, is generally considered a suspicious circumstance, and raises a presumption of fraud ; but it is not decisive, and may be rebutted by showing that the party has not abused the confidence placed in him. For where an instrument is prepared by direction of the party who seeks advantage from it, and the other party has no person with whom he consults on the subject, or any thing is withheld from a person so consulted, a great degree of jealousy attends the instrument." Daniel seems to have been the principal actor in procuring the release. This was probably owing to his being more intimate with, and having a greater share of the confidence of his sister. But the three brothers are so connected in the transaction, that each is affected by the acts of the other. They were all in the same situation ; each held a farm by the

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same tenure ; each required a release from the heirs at law of their father to perfect their title. They released to each other and Elizabeth signed the release with them.

4. The circumstances attending the execution of this paper have an important bearing upon this case. It is obvious that the mode in which the papers were prepared is of very little consequence, provided they were submitted to her, and fairly examined and understood by her, before execution. On the other hand, if they were not read by, nor to, her, nor explained to her, then it is indeed difficult to see how they can stand as her deeds. It appears from the evidence, that in the latter part of January, or the first of February, Daniel went to the residence of Mrs. Sears to take her to his house. She was unable to go the first and second times he went for her. The third time she went with him and remained at his house a day and one or two nights. This was about the time of the execution of the releases. But whether they were executed during this time, or a few days afterwards at her house, is left in some doubt. The preponderance of the testimony is in favor of the latter supposition. Gen. Borland, the surviving subscribing witness, does not recollect the execution of the paper ; his impression is that it was executed at Mrs. Sears' house. Eve Shafer, the mother of the defendants, swears that she was present at the house of Mrs. Sears when a release was signed ; that Gen. Borland brought the release there and read it over to the persons there, of whom Mrs. Sears was one. I think the fair conclusion is, that Mrs. Sears was taken down to Daniel's, and her assent obtained to the arrangement ; that Daniel then went to Gen. Borland's and had the papers prepared, and then the parties, at a subsequent day, met and executed them at the house of Mrs. Sears. But the circumstances attending this transaction do not satisfy my mind that Mrs. Sears fully understood the nature and effect of the papers she was induced to sign. There is no direct proof that this release was read over in her hearing. The most that is said by the defendant's mother is, that Gen. Borland read over a release while they were all present. Now Mrs. Sears was unable to read English at all,

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or even write her name. It would be presuming a great deal, to infer that she understood fully the effect of such a paper, even if the proof was clear that she heard it read. She may very well have supposed that it was a paper necessary to be signed in order to carry into effect some portion of her father's will. At all events, it is incumbent upon a party who sets up a conveyance of this kind to show affirmatively that the transaction is fair and honest. The relation of the parties—the magnitude of the gift, compared with the means of the giver—the activity on the part of the donee, and the passive condition of the donor, all tend to throw a suspicion about the act, which throws the burden of proof upon the person seeking to avail himself of such an instrument. In the language of Lord Eldon in *Gibson v. Jeyes*, (6 Ves. 266,) “those who meddle with such transactions take upon themselves the whole proof that the thing is righteous.”

I am aware of the difficulty of making full and explicit proof of a fact, after the lapse of twenty-seven years; and I have therefore carefully looked through the depositions to find some of the ordinary proof presented on such occasions, to supply the place of direct evidence. But I have been unable to discover any traces of an intention on the part of Mrs. Sears to make this donation. I cannot learn that the subject of her father's will was ever talked over in her presence, or that she ever knew of the manner in which the real estate was devised. The only conversation held by her in relation to the release, if any, was after its execution; and that tends to weaken rather than strengthen the defendants' case. Mary Sears, a step-daughter of Elizabeth, who was a member of her family, testifies, that a few days after the latter had been to her brother Daniel's, she (Mary) while standing at the door overheard Mrs. Sears tell Daniel that she was not willing to sign any more papers; that he had compelled her to sign those papers that she had signed before, against her will, and she was very sorry for it. It would seem also from the testimony of this witness, that nothing was known in the family relative to this transaction prior to the

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death of Elizabeth ; and the releases were not recorded until the year 1841.

It is said that the *intention* of the testator to devise the lands to his sons in fee, is so apparent as to raise a strong moral obligation on the part of the sister to convey. But I am by no means sure that such was the actual intention. The will is well drawn, has the regular attestation clause, and a note of interlineations. It is obviously the workmanship of a lawyer, or some one acquainted with that business. The *law* declares the intention : the testator is presumed to have intended what he has done. It is manifestly unsafe to conjecture that a man intends any thing different from that which he has legally expressed, or that he has used words in any other sense than that which the law affixes to them. If it were material to institute a comparison, it would appear much more reasonable to conclude that the testator intended to give but a life estate, as he clearly has done by the will which he signed in the presence of three witnesses, than that the daughter understood the true force and effect of the release to which she put her mark, and by which she stripped her infant children of the estate which the law devolved upon them. Upon the whole, I see no ground upon which this release can stand. A decree must therefore be entered annulling it, and declaring the rights of the plaintiffs, as heirs at law of Elizabeth Sears, as if no such instrument had been made.

The defendants must also be charged with the costs of this suit.

NEW-YORK SPECIAL TERM, December, 1847.

Harris, Justice.

IRELAND vs. SMITH.

Where a person in the receipt of a monthly salary, as an officer in the custom house, assigned the same to another before it became due and payable, and gave the assignee his draft upon the disbursing officer of the custom house, for the amount, payable when the salary should become due; and deposited the draft with the disbursing officer, with the understanding that when the salary should become due the assignor should endorse the check which was required by the regulations of the custom house to be endorsed by him, and receive the draft from the officer and leave with him the check for the assignee; *Held*, that such salary could not be reached by a creditor's bill filed against the assignor subsequent to the assignment.

Held also, that the act of endorsing such check, by the assignor, after the filing of the creditor's bill and the service of an injunction, was not a violation of such injunction.

IN EQUITY. This was a motion for an attachment against the defendant, for the violation of an injunction. The defendant is a measurer connected with the custom house in the city of New-York, and as such is entitled to a salary of \$125 per month, payable on the last day of each month. On the first day of September, 1847, the plaintiff filed a creditor's bill against the defendant, with a view to reach the month's salary which had become payable the day previous, and served upon the defendant the usual injunction. In the early part of August, the defendant had applied to one Sharp to advance to him the amount of his month's salary. He accordingly received from Sharp \$125, and gave him a draft upon the paying officer of the custom house for that amount, payable the last day of August. It was agreed between Sharp and the defendant, at the time, that the draft should be deposited with the paying officer, and that when the salary should become due the defendant should endorse the check, which according to the regulations of the custom house was required, and receive the draft from the officer and leave with him the check for Sharp. In pursuance of this agreement, the defendant, after the injunction had

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been served on him, endorsed the check for his salary, which was left with the officer, and was afterwards delivered by him to Sharp.

W. T. Horn, for the plaintiff, contended that the fund belonged to the defendant at the time of serving the injunction. The draft was a mere request to pay money, and not being accepted it created no lien on the fund; and even had it been accepted it would not have done so, as there was, at that time, no fund in existence. Neither can the draft be considered as an assignment of the salary. (18 *Wend.* 344. 2 *Edw. Ch. Rep.* 438.)

H. P. Wanmaker, for the defendant.

HARRIS, J. The transaction between the defendant and Sharp amounted to an equitable appropriation, if not to a legal transfer, of the defendant's salary for the month of August. The officer upon whom the draft was drawn had notice of such appropriation; and by receiving the draft from Sharp he must be deemed to have assented to the payment. If the endorsement of the check was necessary to put Sharp in possession of the fund to which he was already entitled, the defendant was bound to make such endorsement. If he had refused, he might have been compelled to do so. The defendant had no right to that portion of his salary. To have received it would have been a gross fraud upon Sharp. Had it come into the hands of a receiver appointed in this suit, I think it would have been the duty of this court to direct it to be paid to Sharp. The plaintiff has come to a court of equity for assistance in the collection of his debt. And the court, while extending its aid to him, will also see that the equitable rights of others are protected. Although the money then due had been earned by the defendant, and although his endorsement upon the check was required according to the regulations of the custom house, before the money would be paid, yet at the time the injunction was served, the defendant had no right to collect the money,

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or if he had received it, to appropriate it to the payment of his debts or otherwise to his own use. There is nothing then in the act of endorsing the check which amounts, even constructively, to a violation of the injunction, and the motion must be denied with costs.(a)

(a) See *Browning v. Bettis*, (8 Paige, 569;) *McCoun v. Dorsheimer*, (1 Clarke's Rep. 144.) In *Hudson v. Plets*, (11 Paige, 180,) it was held that the recovery of a judgment by a defendant in a creditor's suit after the service of the injunction, for a tort done to his exempt property, and even the collection of the amount of such judgment by him, would not constitute a breach of such injunction; inasmuch as the creditor had no interest whatever in the property of the debtor which was exempted by law from sale upon execution. So in this case, the amount of the salary having been assigned to another person previous to the filing of the creditor's bill, the creditor had no interest in it and could not reach it by his bill. He therefore was not injured by the act of endorsing the check.

SAME TERM. *Before the same Justice.*

HORTON and wife vs. BUSKIRK and others.

Where, upon an order of reference to a master, in a partition suit, to ascertain and report the liens upon the undivided shares of the several parties, the assignee of a judgment which is a lien upon the share of one of the parties produces before the master the record of his judgment, and the assignment thereof to himself; and the master, in consequence of a mistake in drawing the assignment, by which a cancelled judgment was described, instead of the true one, reports against the validity of the lien; and such mistake in the assignment is not discovered until after the time for proving liens has expired, the court will allow the creditor to come in and prove the true judgment, upon terms.

THIS was a suit in partition. On the 14th of April, 1847, the usual order of reference was made, to ascertain and report the specific and general liens upon the undivided shares of the several parties. The time for creditors to come in and prove their liens before the master expired on the first of June. The defendant Buskirk now presented his petition, stating that on the

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25th of May last, he purchased of one Meigs a judgment for \$10,000 debt and \$18,28 costs, docketed October 21, 1839, against George B. Penfield, one of the defendants, and which was a lien upon his share of the premises; that the attorney who drew the assignment of the judgment, by mistake described another judgment in favor of the same plaintiff against Penfield, for \$2527,50; that a certified copy of the record of the latter judgment was produced before the master together with the assignment; that in August, and after the time for proving liens had expired, he discovered the mistake in the description of the judgment, in his assignment, and that the judgment actually assigned had been "*virtually cancelled*," and thereupon he immediately procured from Meigs an assignment of the other judgment. He now asked that he might be permitted to come in and prove the other judgment. In opposition to the motion it was shown, that upon the reference the validity of the judgment which had been assigned to Buskirk and which he attempted to establish before the master, was contested by other judgment creditors of Penfield, and that the master reported against its validity; and also that the solicitor for Buskirk knew of the existence of the \$10,000 judgment at the time. A similar motion was made at a special term in October, and denied with costs, but with liberty to renew the same.

P. J. Joachimssen, for Buskirk.

T. Nelson, for the opposing creditors.

HARRIS, J. The circumstances of this case certainly seem to justify the suspicion that Buskirk, so long as he supposed the judgment which had been actually assigned to him to be a valid judgment, was willing to rely upon it; and that this application was an expedient, resorted to after he ascertained that the master had reported against the validity of the judgment which had been presented to him as a lien upon the share of Penfield in the premises to be sold. But as Buskirk swears positively to the mistake, and as his affidavit is cor-

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roborated by the affidavits of Meigs, the plaintiff in the judgment, and of the attorney who drew the assignment, I do not feel at liberty to deny the application. Before, however, the petitioner can be permitted to prove his judgment, he must pay to the solicitor for the opposing creditors the costs of resisting the claim presented by him before the master upon the assignment of the other judgments, to be taxed, and the costs of opposing the motion made in October last, and also the costs of opposing this motion. If within ten days after service of a taxed bill of said costs the petitioner shall pay the same, then it may be referred to the master who executed the former reference, to take proof of the judgment described in the petition, and which is claimed to be a lien upon the share of Penfield in the premises sold. And for that purpose he may be allowed thirty days after the time for paying the costs shall expire. The costs of such reference must also be paid by the petitioner. If he shall fail to pay the costs within the time limited, this motion to be denied with costs.

SAME TERM. *Before the same Justice.*

BROWER vs. BROOKS and others.

In all cases where the party against whom a motion is made would have a right, in answer thereto, to explain by affidavit the matters which constitute the foundation of the motion, he should be apprized, by the notice of the motion, or by the papers upon which the motion is to be founded, of the grounds upon which the moving party relies to sustain his motion.

IN EQUITY. The plaintiff moved to take from the files of the court, the plea of the defendant Brooks, on the ground that it was not duly verified by the defendant's oath.

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A. M. Burt, for the plaintiff.

B. S. Brooks, for the defendant Brooks.

HARRIS, J. The plea having been filed without being sworn to, is undoubtedly irregular. But I think the objection to the sufficiency of the notice of this motion is well taken. It is a salutary rule in all cases, where in answer to a motion, the opposite party would have a right to explain by affidavit the matters which constitute the foundation of the motion, that he should be apprized, by the notice of the motion, or by the papers upon which the motion is to be founded, of the grounds upon which the moving party relies to sustain his motion. (*Hanna v. Curtis*, 1 Barb. Ch. Rep. 263.) In this case there is nothing in the notice of motion, or in the papers themselves, from which the defendants can be informed as to the points upon which the plaintiff will insist in support of his motion. The notice is merely that a motion will be made to take the plea from the files of the court, and that it will be founded upon the bill and plea. I think this is not sufficient. The notice should have specified that the ground upon which the motion would be founded was that the plea had not been sworn to. It is possible that had the defendant been thus apprized of the ground of the motion, he might have been prepared to show that consent had been given to file the plea without oath, or in some other way to show that the plea had not been irregularly filed. For this reason the motion must be denied; but as the plaintiff is entitled to have the plea verified by the defendant's oath, he may have liberty to renew the motion, unless within six days the defendant files and serves a new plea. Neither party is to have costs upon this motion.

SAME TERM. *Before the same Justice.*

PRATT and others *vs.* WELLS.

It is a general rule that if a creditor has an adequate remedy at law, so that he can hold his debtor to bail, by suit at law, he is not entitled to a writ of *ne exeat* from a court of equity.

The application for a *ne exeat* is addressed to the discretion of the court; and if there is any exception to the rule that the writ will not be issued when the plaintiff has a right of action at law, such exception must be founded upon some difficulty in proceeding at law.

Even where a court of equity has the power to grant the writ of *ne exeat*, it will be very cautious in the exercise of such power.

The fact that there has been a previous holding to bail at law, from which the defendant has been discharged, is a fatal objection to an application for the writ.

IN EQUITY. This was a motion to discharge a *ne exeat* upon which the defendant had been arrested and held to bail. The motion was founded upon the bill, and upon an affidavit of the defendant's counsel. The bill stated that in August, 1847, the defendant fraudulently obtained from the plaintiffs, who are comb manufacturers in the state of Connecticut, goods to the amount of about \$1800, which were immediately sold by him for a less price than he had agreed to pay for them; that he had disposed of all his property, and was about to leave the state; having taken his passage to Florida; that the credit upon which the plaintiffs sold the goods had not yet expired, but the plaintiffs insisted that having been induced to sell the goods by false representations, they have a right to treat the debt as due. The bill prayed that the defendant might "be decreed to pay the plaintiffs such sum as might be found due on a just accounting between them," but did not contain a prayer for general relief.

The affidavit read upon the motion, showed that before the filing of the bill, the defendant had been arrested at the suit of the plaintiffs for the same matter set forth in the bill, in an action of trover, and that he had been discharged from such arrest by an order granted by one of the justices of this court.

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R. Goodman, for the defendant.

J. L. White, for the plaintiffs.

HARRIS, J. It is not necessary to decide, upon this motion, whether or not the suit in this court can be maintained. It is certain that if it can be maintained at all, the action at law can also be maintained. And I understand the general rule to be that if a creditor has an adequate remedy at law, so that he can hold his debtor to bail by a suit at law, he is not entitled to a writ of *ne exeat* from a court of equity. The application for the writ is addressed to the discretion of the court; and if there is any exception to the rule that it will not be issued when the plaintiff has a right of action at law, such exception must be founded upon some difficulty in proceeding at law. It is upon this ground that in some instances the writ has been granted upon bills filed for an account, or for alimony. In such cases, although the defendant might perhaps be arrested in an action at law, yet from the nature of the case, the proceedings in such an action would be difficult, and for that reason are more properly the subject of equitable cognizance.

But even where it has the power to grant this writ, a court of equity will be very cautious in its exercise. In *Jenkins v. Parkinson*, (2 *Mylne & Keen*, 5,) Lord Brougham said, "the writ is strictly confined to cases where the party has no remedy at law, unless in the excepted cases of a decree obtained for alimony, and a balance sworn to upon an account. All the authorities are against stretching this exception." And in *Raymes v. Wyse*, (2 *Merivale*, 472,) which was a case very similar to this, Lord Eldon held that the fact that there had been a previous holding to bail at law, from which the defendant had been discharged, was a fatal objection to an application for a *ne exeat*.

The motion must therefore be granted, but without costs.

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POWELL vs. MYERS.

The 96th rule of the supreme court, adopted in 1837, being omitted in the revision of 1847, a plaintiff may now amend his declaration by adding a defendant, after a plea in abatement founded upon the non-joinder.

A plaintiff has the same right to amend his declaration after a plea in abatement for want of parties, as in any other case. The only restriction imposed upon the plaintiff's right to amend, under the present 22d rule, is that contained in the 23d rule.

THIS is a motion to set aside the defendant's default for not pleading to an amended declaration. The suit was commenced by declaration. One of the defendants pleaded in abatement the non-joinder of Joyce as a defendant. The plaintiff, within the time allowed by the 22d rule, amended his declaration by making Joyce a defendant, and served on the defendants' attorney a copy of the amended declaration, with the usual notice to plead; which the defendants' attorney disregarded.

E. Fitch Smith, for the defendants, cited 7 *Hill*, 145; 6 *Ad. & El.* 778.

T. C. T. Buckley, for the plaintiff.

HARRIS, J. If the plaintiff's practice had in fact been irregular, the proper course for the defendants would have been to move to set aside the amended declaration, and the subsequent proceedings; as was done in the case of *Atkinson* ads. *Clapp*, (1 *Wend.* 71.) But I think the plaintiff's practice was regular. In the present rules of the court, the 96th rule adopted in 1837 is omitted. It was also omitted in the revision of 1845. That rule operated as a restriction upon the right to amend, given by the 23d rule of the old court, of which the 22d rule now in force is a copy. Under the provisions of the old 96th rule, a plaintiff might amend his declaration after a plea in abatement, of the non-joinder of a person who ought to have been made a defen-

Luysten v. Sniffen.

dant, by inserting the name of such person in the declaration ; but he could only do so on payment of costs. That rule operated as a restriction upon the 23d rule in that respect. There never was any reason, in fact, why the plaintiff should be required to pay costs in such a case, as a condition upon which he should be allowed to amend, more than in any other case ; and the rule was therefore properly abolished. When abolished, it left the plaintiff the same right to amend his declaration, after such a plea in abatement, as in any other case. The only restriction imposed upon the right to amend, under the present 22d rule, is that contained in the succeeding rule. And the plaintiff in this case, having, within the time allowed for that purpose, filed and served his amended declaration, he was strictly regular in his practice. The defendants have sworn to merits, and the motion must, therefore, be granted on payment of the costs of the default and the subsequent proceedings, and the costs of opposing this motion.

SAME TERM. *Before the same Justice.*

LUYSTEN vs. SNIFFEN.

If the record upon which a writ of error is brought has not been properly made up, the proper course is to apply to the court in which the judgment was rendered, to amend the record. With such errors the appellate court has nothing to do.

Upon a writ of error, the appellate court will assume that the court below has made up the record of its judgment correctly ; or, if such record is amended, that the amendment was properly made.

It is the province of the supreme court to examine, and correct, all errors which shall be found in any record brought there by writ of error ; but it has no control over errors which have occurred in making up such record.

If the court below sees fit to correct an error, in the form of its record, it is a matter of course for the supreme court to allow the copy of such record which had been sent to that court previous to the amendment, to be also amended.

But such amendments should only be allowed on such terms as will prevent injustice.

Luyten v. Sniffen.

THIS was a motion on the part of the defendant in error, to amend the copy of the record sent to this court by the New-York common pleas, with the writ of error issued in this case; so as to make such copy correspond with the record as amended by the court below. The judgment in the court below was rendered upon a report of referees; and the plaintiff in error, who was defendant in the suit below, being dissatisfied with the report, applied to the court below to have a statement of facts settled and incorporated in the record, for the purpose of bringing error thereon. After the record was made up, and transcribed according to the practice of the court, the defendant in error applied to the court below for a re-settlement of the statement of facts which had been inserted in the record. The application was granted, and the statement of facts had been re-settled and the record amended accordingly, so that the record in this court did not correspond with the record in the court below.

T. E. Tomlinson, for the defendant in error.

H. M. Western, for the plaintiff in error

HARRIS, J. If the record upon which the writ of error is brought, has not been properly made up, the proper course is to apply to the court in which the judgment was rendered, to amend the record. (*Rew v. Barker*, 2 Cowen, 408.) With such errors, the appellate court has nothing to do. It will assume that the court below has made up the record of its judgment correctly, or if such record is amended, that the amendment was properly made. It is the province of this court to examine and correct all errors which shall be found in *any record* brought here by writ of error; but it has no control over errors which have occurred in making up such record. If the court below sees fit to correct an error in the form of its record, it is a matter of course to allow the copy of such record which had been sent to this court before such amendments, to be also amended. But such amendments should only be allowed on such terms as will prevent injustice. In this case, the plaintiff in error, re-

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lying upon the errors which he supposed existed in the record below, has brought his writ of error, and issue having been joined thereon, in this court, the cause is now in readiness for argument. It may be, that if the record had been originally made up as it is now amended, no writ of error would have been brought. If the plaintiff in error should elect to abandon his writ of error on such amendment being made, he ought to be permitted to do so without costs.

The motion is therefore granted; but the rule to be entered must also contain a provision allowing the plaintiff in error, within ten days, to dismiss his writ of error without costs, if he shall elect so to do.

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Barbour.
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BISSELL vs. BISSELL.

The granting of an allowance to the wife for alimony and expenses in suits for divorce, or for a separation, is in the discretion of the court. But the rules which govern the court in the exercise of that discretion are very different in the two cases.

Where a bill is filed for a divorce, the wife is entitled of course to an allowance for alimony and expenses; unless there is an undenied charge of adultery against her. But if the bill is filed by the wife for a separation, it is so far from being a matter of course to allow her alimony and expenses, that it must at least appear that the plaintiff had good ground for bringing the suit.

IN EQUITY. The bill in this cause was filed by the wife against her husband, for a separation, on the ground of cruel and inhuman treatment. The plaintiff applied for alimony and for an allowance to enable her to carry on this suit.

W. H. Meeks, for the plaintiff.

Jonathan Miller, for the defendant, as to the cruelty which will justify a divorce a *mensa et thoro*, cited *Stark v. Stark*,

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(*Dudley's Eq. Rep.* 65 ;) *Worden v. Worden*, (3 *Edw. Rep.* 387 ;) *Boyd v. Boyd*, (*Harp. Eq. Rep.* 144 ;) *Mason v. Mason*, (1 *Edw.* 291 ;) *Perry v. Perry*, (2 *Paige*, 501.) If the allegations in the bill which are not denied are not sufficient to justify a decree for divorce, no alimony can be allowed for the further prosecuting the suit.

HARRIS, J. The granting of an allowance to the wife for alimony and expenses, in suits for divorce, or for a separation, is in the discretion of the court. But the rules which govern the court in the exercise of that discretion are very different in the two cases. If the bill is filed for a divorce, the wife is entitled of course to the allowance, unless there is an undenied charge of adultery against her. But when the bill is filed by the wife for a separation, it is so far from being a matter of course to allow alimony and expenses, that it must at least appear that the plaintiff had good ground for bringing the suit.

In this case, the answer of the defendant was put in on oath, although an answer on oath was waived by the bill. The answer denies, or explains, all the acts of unkindness and improper treatment set forth in the bill, in such a manner as to leave a strong impression upon the mind that the husband is the more injured party. And as the answer is entitled to the same force, as evidence, as the bill, the court cannot, upon the bill and answer merely, decide that the plaintiff has a meritorious cause of action. The motion must therefore be denied.

A motion is also made by the plaintiff to have issues settled for the trial of the question involved in this cause. There can be no objection to a reference to some suitable person for that purpose ; or if it is preferred, the cause may be referred to some suitable person as referee, to hear the proofs and allegations of the parties, and determine the matters in controversy, and report thereon to this court.

SAME TERM. *Before the same Justice.*

SLOSSON vs. DUFF.

Loaning uncurrent money, upon an agreement that the amount loaned shall be repaid in current funds, does not amount to usury where the discount upon the money loaned is very trifling, and the same will pass current in the market, in the way of trade.

Such a loan is not a violation of the statute, unless there is something in the transaction from which it is to be inferred, as a matter of fact, that it was a mere contrivance to obtain more than the legal rate of interest by loaning bills which were not intrinsically worth their nominal amount; and where it does not appear that the money loaned was not worth, to both parties, the amount at which it was received by the borrower.

It seems that the plaintiff in a junior judgment cannot set up the defence of usury against the claim of a plaintiff in a prior judgment to the surplus moneys arising from the sale of premises upon which both judgments are liens; without consenting to the allowance of the amount actually due upon the prior lien.

IN EQUITY. This case came before the court upon exceptions to a master's report. The defendant James Duff and one Alfred Ivers, being partners, were on the 4th of December, 1846, indebted to James Burtus in the sum of \$934,94, to Peter Morris in the sum of \$685, and to Matthew Duff in the sum of \$1650. On that day Duff & Ivers confessed a judgment in favor of these three creditors for the aggregate amount of their debts. On the 20th of November, 1846, Benjamin Stephens also recovered a judgment against Duff & Ivers for \$265,54, and on the 6th of January, 1847, Alfred G. Ivers, administrator of Beach Ivers, deceased, recovered against the same defendants a judgment for \$10,109,38. Each of these judgments was docketed in the city of New-York, and became a lien upon the defendant's real estate in that city. Subsequent to the recovery of these judgments, certain real estate of the defendant James Duff in the city of New-York was sold upon a decree of foreclosure in this cause; and the surplus moneys arising from the sale having been paid into court, the usual order of reference in such cases was made on the 4th of March, 1847. Upon the hearing before the master it was conceded

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that the small judgment in favor of Stephens was entitled to be first paid out of the moneys in court; and the same has, by consent of parties, been since paid accordingly. The claim of the plaintiffs in the second judgment was resisted by the plaintiff in the third judgment, on the ground that the debt in favor of Burtus, included in that judgment, was for an usurious loan to the defendants, and that the whole judgment was therefore void. The master so decided, and he accordingly reported that the plaintiff in the third judgment was entitled to the surplus moneys remaining after payment of the amount due upon the first judgment. To this report the plaintiffs in the second judgment excepted.

C. O'Connor, for the plaintiffs in the second judgment.

J. L. Mason, for the plaintiff in the third judgment.

HARRIS, J. It was settled in the case of *Post v. The Bank of Utica*, (7 Hill, 391,) that a creditor having a junior lien upon real estate cannot maintain a bill to set aside a prior incumbrance alleged to be void for usury, without paying, or offering to pay, the amount actually due upon the prior lien. I think the same principle is applicable in the present case; and that the plaintiff in the junior judgment is not in a position to set up the defence of usury against the claim of the plaintiffs in the prior judgment to the surplus moneys arising from the sale of premises upon which both judgments were a lien. But in the view I have taken of the case it is unnecessary to decide the question; for I think the allegation of usury in the loan from Burtus to Duff & Ivers, included in the prior judgment, is not sustained. The only evidence relied upon for this purpose is in the examination of Burtus himself before the master. From his testimony it appears that he kept an exchange office, and was in the habit of lending uncurrent money, to be paid in current funds; that from time to time he had loaned to Duff & Ivers uncurrent money; and the condition of the loans was generally that they should be repaid in current money, in a

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week; that the discount upon the money thus loaned would not average over three-fourths of one per cent, and that it would pass current in the market, in the way of trade.

I do not think these facts furnish sufficient evidence to justify the court in attaching to the transaction the taint of usury. There certainly is nothing upon the face of the transaction that imports usury, nor do I think the evidence warrants the conclusion that there was any corrupt agreement or device to receive, or take, more than the legal rate of interest. There is nothing in the case to show that the uncurrent money received by Duff & Ivers was not the bills of solvent specie-paying banks. Indeed the small discount at which these bills might be converted into specie furnishes satisfactory evidence that the bills were such as would be promptly redeemed, when presented at the counter of the banks by which they were issued. Such bills, it is well known, are, for all the ordinary purposes of money, equivalent to the same amount of specie. And unless there is something in the transaction from which it is to be inferred, as a matter of fact, that the transaction was a mere contrivance to obtain more than the legal rate of interest, by loaning bills which were not intrinsically worth their nominal amount, the statute has not been violated. In the case of *Cleveland v. Loder*, (7 Paige, 557,) relied upon by the counsel for the junior judgment creditor as an authority to show the transaction between Burtus and Duff & Ivers to be usurious, the chancellor lays down the rule as follows: "If it was a part of the agreement for the loan that the complainant should take uncurrent bills at a higher rate than their actual value, *and for more than they were worth to either party in cash or current funds, the loan was usurious.*" Although it may be that the bills which Duff & Ivers received upon this loan were not receivable by the banks in the city of New-York at par, and could only be converted into gold and silver by presenting them at the counter of the banks issuing them, yet it does not appear, that they were not worth, to *both parties*, the amount at which they were received by Duff & Ivers. Applying the rule laid down

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by the chancellor in the case referred to, the transaction ought not to be held usurious.

In the case of *Stewart v. The Mechanics' and Farmers' Bank*, (19 John. 496,) the loan consisted of \$1500 current money, and \$5000 in the bills of the Niagara Bank, which had then suspended payment. Stewart had previously applied to the same bank for a loan upon the ordinary terms, and finding he could not obtain such a loan, he proposed to receive the Niagara Bank bills; and assigned as a reason, that he owed the Niagara Bank \$1000, which he could pay in the bills of that bank, and the residue he could disburse in the vicinity of Buffalo in the purchase of provisions, fuel, and other articles for his steamboat. It was shown that at Buffalo, where the bank was located, the bills were generally taken by merchants, for goods, at par, and some received them in payment of debts. These facts were deemed material in determining the question whether the loan was contrary to the statute; whether, under the device of lending part in their own bills and part in the bills of the Bank of Niagara, the bank making the loan had not *intentionally* and knowingly taken more than the legal rate of interest. "I say *knowingly* and *intentionally*," said Chief Justice Spencer, in delivering the opinion of the court of errors in that case, "*for it cannot be pretended that unless the bank knew that the bills of the Niagara Bank were depreciated and not intrinsically worth their nominal amount, and intentionally put them off at their nominal value, with such knowledge, it would be a case of usury.*" See also the *Bank of the U. S. v. Waggoner*, (9 Peters, 378.)

I think the transaction under consideration may fairly be regarded as a mere exchange of credits. Burtus held the notes of certain banks which to him were of par value, because payment could have been enforced, and which to Duff & Ivers were equal in value to gold and silver, because they would pass current in the payment of their debts. The exchange was a mutual accommodation to both parties. The effect of it was to give to Duff & Ivers the immediate use of what was equivalent in value to specie, with a saving of one week's interest,

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while Burtus, by means of the transaction, would be enabled to obtain current funds for his bank bills with less inconvenience, and perhaps with less expense, than by presenting them for redemption to the banks by which they were issued. There was no disguise in the transaction. It was in fact what it purported to be, a mere exchange of bank bills, held by one of the parties, whose marketable value was a little less than par, for the check of the other party payable at a future day—an exchange in which both parties supposed they had obtained an equivalent value. I can see no ground upon which a legal objection to the transaction can be founded.

The exceptions to the master's report are therefore allowed, and an order must be entered, directing the application of the surplus moneys to the payment of the judgment in favor of Burtus, Morris and Duff.

SAME TERM. *Before the same Justice.*

In the matter of JOHN MASON.

The reason of the greater strictness which prevails in the English court of chancery in relation to the form of the inquisition upon a commission in the nature of a writ *de lunatico inquirendo*, has no connection, it seems, with the question of jurisdiction. But it is to be found in the fact that by the English statutes, the party who, by an inquisition, has been found to be a lunatic, or person of unsound mind, has a right to traverse the finding of the jury.

Here, the right to traverse the inquisition does not exist; and therefore there is not the same reason for insisting upon a particular form in the finding of the jury.

By the statute of this state, the care and custody of the persons and estates of lunatics, idiots, &c., is confided to the court of chancery, without any restriction or limitation. The manner in which the control thus given is to be exercised, is entirely a matter of discretion. The form of the return to the inquisition is only important so far as it is necessary to satisfy the conscience of the court.

If enough appears upon the inquisition to enable the court to adjudge the party to be within some one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient.

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It is enough to give the court jurisdiction if the jury find that the party is mentally incapable of governing himself, or managing his affairs.

Yet it seems it is better to adhere to the technical form of finding in the language of the statute itself.

IN EQUITY. In December, 1839, Isaac Jones, George Jones, and Andrew G. Hamersley, executors of the last will and testament of John Mason deceased, presented to the vice chancellor of the first circuit a petition, stating that John Mason, a son of John Mason deceased, was, and for several years had been, so far deprived of his reason and understanding, that he was rendered entirely unfit and unable to govern himself, or to manage his affairs; and praying that a commission in the nature of a writ *de lunatico inquirendo* might be issued, to inquire of his lunacy; and thereupon a commission in the usual form was issued. Upon the execution of the commission, the jury returned, by their inquisition, "that the said John Mason, jun. is so far weakened and impaired in the faculties of his mind as to be mentally incapable of the government of himself, and of the management of his goods and chattels, lands and affairs; and that he has been so incapable for the space of four years now last past; but how, or by what means, the said John Mason became incapacitated, the jurors aforesaid know not, except it be sickness and the visitation of God." On the coming in of the inquisition, the vice chancellor, regarding the finding of the jury as informal, if not insufficient, (as appears from the report of the case in 3 *Edw. Ch. Rep.* 380,) directed that a copy of the inquisition, with notice of the motion for a committee, should be served on the party alleged to be of unsound mind, and that the person making such service should explain to him the nature of the inquisition, and the object of the notice, and apprise him that if he, or his friends, thought fit so to do, opposition could be made to the application for the appointment of a committee. Upon the hearing of the motion for a committee, it was shown that a copy of the inquisition and notice had been served as required, and that Mason stated to the person making such service that he was incompetent to take charge of himself or his property, and that he wished to have Isaac Jones ap-

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pointed for that purpose. The usual order of reference was then made, to report suitable persons to be appointed a committee, the amount of security to be given, and the amount which should be allowed for the support of the person alleged to be of unsound mind. And upon the coming in of the report, an order was made, on the 16th of April, 1840, appointing Isaac Jones, a brother-in-law, and Rebecca Jones, a sister of Mason, his committee, and directing an allowance of two thousand dollars per annum for his support.

A petition was presented by James Mason, a brother of John Mason, alleging that the inquisition upon which the order for the appointment of a committee was founded, was illegal and insufficient to justify or support the proceedings, and praying that the inquisition and subsequent proceedings might be set aside. It was also alleged in the petition, that the committee, by reason of their direct pecuniary interest in the estate of Mason, and also by reason of the grossly neglectful manner in which they have exercised their powers as his committee, are unfit and unsuitable persons to be entrusted with the charge and care of his person or estate; that they had neglected and refused to file any account of their receipts and expenditures, and had refused to expend, for his care and comfort, more than \$500 annually; and further, that his health and happiness, if not his life, required his immediate removal from the custody of his committee; and it was asked that an examination might be had in respect to the management of the estate and person of Mason, by his committee.

John Mason himself also presented a petition, in which he stated that since April, 1840, he had been in the custody of his committee—that he had long been desirous of being restored to the enjoyment of his personal liberty and his estate, but that in consequence of his being feeble in strength of body and mind, he had continued to submit to their deprivation. He asked that he might have the privilege of choosing where he might live, and in what manner his own money might be expended for his benefit.

In opposition to the application, the affidavit of the commit-

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tee, and several near relatives of Mason, together with his nurse and attending physician, were produced, disproving the allegations of neglect and improper treatment, and showing that due exertions had been made by the committee to promote the comfort and health of their charge. It was also shown by the affidavit of Dr. McDonald, a physician who has for many years devoted himself to the study and treatment of cases of mental weakness and disease, that Mason was still a person of unsound mind, and unfit and unable to govern himself, and to manage his affairs, and take charge of his property.

J. J. Ring, for the petitioner.

M. S. Bidwell & D. Lord, for the committee.

HARRIS, J. Upon the hearing of this motion, the counsel, by whom it was argued on behalf of the petitioners, very properly, I think, abandoned the ground that the committee should be removed on account of misconduct or inattention to the duties of their trust, and relied entirely upon the insufficiency of the return of the jury, upon the taking of the inquisition, to sustain the proceedings. The question now to be determined relates, therefore, solely to the regularity of the proceedings which resulted in the appointment of the committee.

The earlier chancellors of England, in the exercise of their jurisdiction over persons incapable of taking care of themselves, confined themselves to cases of strict idiocy and lunacy. Accordingly, Lord Hardwicke, in the case *Ex parte Barnsley*, (3 *Atk.* 168,) held an inquisition which found that the alleged lunatic, from weakness of mind, was incapable of governing himself, or his estate, to be insufficient. In that case, the Lord Chancellor remarked, that he was glad to find, upon search, that except in two or three instances, the return had been *lunaticus*, or *non compos mentis*, or *insanæ mentis*; or, since the proceedings have been in English, of *unsound mind*. He added, that he desired they should continue so, or otherwise it would introduce *great uncertainty*.

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About the same time, the same chancellor quashed a return which found the alleged lunatic not of sufficient understanding to manage his own affairs; and another in which the jury found him to be "Worn out with age and incapable of managing his own affairs." At a later day, the decision of Lord Erskine in the case *Ex parte Cranmer*, (12 Vesey, 445,) gave a more enlarged and extended jurisdiction to this paternal care of the court; and he held that it embraced cases of imbecility resulting from old age, sickness, or other causes. The question, he said, was whether the party had become *mentally incapable of managing his affairs*. In a previous case, Lord Eldon had decided that it was not necessary, in support of a commission in the nature of a writ *de lunatico inquirendo*, to establish lunacy; but it was sufficient if the party was shown to be *incapable of managing his own affairs*. And yet, in all these cases, it was held to be necessary that the jury should find unsoundness of mind; which Lord Hardwicke seems to have understood as correspondent with lunatic, and which Lord Eldon defined to be "such a state of mind as to be contradistinguished from idiocy, and also from lunacy, and yet such as made one a proper object of a commission in the nature of a commission to inquire of idiocy or lunacy."

The reason of this strictness in relation to the form of the inquisition seems not to have had any connection with the question of jurisdiction. On the contrary, we find the English chancellors repeatedly asserting their jurisdiction over all persons who, from age, infirmity, or other misfortune, are incapable of managing their own affairs; while at the same time they hold the finding of the jury upon the execution of the commission insufficient, unless it includes unsoundness of mind. I think the reason of this strictness is to be found in the fact that, by the English statutes, the party who, by an inquisition, had been returned a lunatic, or of unsound mind, had a right to traverse the finding of the jury. It was important, therefore, that there should be no uncertainty in the form of the finding; as it might become the subject of an issue, upon the traverse. But here, the right to traverse the inquisition does not exist, and

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therefore there is not the same reason for insisting upon a particular form in the finding of the jury.

By the statute of this state, the care and custody of the persons and estates of lunatics, idiots, persons of unsound mind, and habitual drunkards is confided to the court of chancery, without any restriction or limitation. The manner in which the control thus given is to be exercised is entirely a matter of discretion. The form of the return to the inquisition is only important so far as it is necessary to satisfy the conscience of the court. If, upon the coming in of the inquisition, enough appears to enable the court to adjudge the party to be within some one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient. A discreet exercise of the power vested in the court undoubtedly requires that before a citizen shall be deprived of his liberty, and the control of his own property, evidence of the most conclusive character should be produced, showing him to be a person for whose benefit the law has benignly provided this delicate and important trust. But I am not prepared to say that a case might not be presented to the court in which the evidence would be so clear and satisfactory as to justify the exercise of its summary power, for the protection of a party, without the intervention of a jury. Whether this be so, or not, I cannot doubt that under the law of this state, it is enough to vest the court with jurisdiction of the case when, as in the case under consideration, the jury find that the party is mentally incapable of governing himself, or managing his affairs. Chancellor Kent seems to have thought so, when in the case of *Barker*, (2 *John. Ch.* 232,) he directed a commission to issue to inquire whether the party was of unsound mind, or mentally incapable of managing his affairs. It is quite evident that in giving this direction, that learned jurist understood the two terms, "unsound mind," and mentally incapable of managing his affairs, as meaning substantially the same thing, and that the use of either phrase in the inquisition would furnish sufficient ground to justify him in proceeding to the appointment of a committee. It is true, that in the case referred to, the jury found that Barker was of unsound mind,

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AND mentally incapable of managing his affairs; yet from the form of the order directing the commission to issue, it is plainly inferable that no force was added to the return of the jury by adopting both phrases. Indeed, looking at both terms in their plain and obvious sense, I cannot but regard the expression "mentally incapable of governing himself or managing his affairs," as necessarily embracing all that is understood by the term "unsound mind," and perhaps more. In the case of *Wendell*, (1 *John. Ch.* 600,) the same learned chancellor also directed an issue to be made and settled to try the question, whether Wendell "be a lunatic or mentally incapable of managing his own affairs;" thus showing that the alternative form of the order was not a mere matter of inadvertence, but that it was deliberately adopted. I agree with Chancellor Walworth in the opinion expressed by him in the matter of *Morgan*, (7 *Paige*, 236,) that it is not wise to depart from the technical form of finding in the language of the statute itself; although, as I have already attempted to show, the same reason which has induced the English court of chancery to confine the jury to the technical expression of unsoundness of mind, does not exist here. It might, perhaps, have been better, in the case now before the court, if the vice chancellor had required a further inquisition; and yet I cannot say that, under the circumstances as they appeared, it was an indiscreet exercise of his undoubted power. However that may be, it was a question of discretion, and not of jurisdiction, and if the vice chancellor erred his error could only have been corrected by appeal. The motion to set aside the proceedings must therefore be denied.

Nor can I say, from any thing before me, that the committee have omitted any thing which would have in any degree contributed to the comfort or happiness of the afflicted individual committed to their charge, or that in any respect they have been unfaithful to their trust. So far from this, they have, I think, fully and satisfactorily met every allegation in the petition, charging them with improper conduct in the management of the person or estate entrusted to their guardianship. A careful examination of the case has confirmed the impression made

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upon my mind on the argument, that the committee had discharged the delicate duties assigned them, with commendable humanity and faithfulness. At the same time, I am inclined to believe it may not be an indiscreet exercise of the supervisory power of the court to direct a further examination to be had in the case. In the discharge of this important branch of its trusts, the court cannot guard too sedulously the welfare of that unhappy class of persons, who, incapable of taking care of themselves, have been committed to its care. I can but hope too, that a reference judiciously conducted, may tend to allay any apprehensions, unfounded as I think they are, which are now entertained by any of the relatives of this unfortunate man, that his comfort is not sufficiently cared for by his committee. I shall, therefore, direct that it be referred to Murray Hoffman, Esquire, or if he shall decline to act as such referee, then to such other person as may be agreed upon by the counsel for the parties, to inquire into the personal condition of this person, and particularly whether or not he has been treated in a due and proper manner by his committee; also whether any greater freedom or indulgence can be granted to him with safety, and whether any change in his situation or mode of life would be conducive to his comfort; also to inquire whether the allowance made for his support, has in good faith been expended for his benefit: to the end that upon the coming in of the report, any further direction may be given which may then be deemed proper. The order should also contain a provision authorizing the referee, and such other persons as he may think proper, to have free access to Mason for the purpose of personal examination, and if the referee shall so direct, that he be present upon the execution of the reference. The costs of the reference must, in the first instance, be paid by the petitioner, James Mason, unless the committee shall elect to have a provision inserted in the order for passing their accounts. In that case, the costs of the reference may be paid out of the estate in the hands of the committee. Otherwise, it must depend upon the result of the examination, and the report of the referee, whether the estate shall bear the expense of the reference.

SAME TERM. *Before the same Justice.*

TITUS vs. CORTELYOU.

It is the right of a party, when he is required to produce books for inspection, upon a reference, if such books contain accounts and transactions which in no way relate to the subject of examination, to seal up such parts of the books; so that they shall not be exposed to the observation of those who have no right to examine them.

Where books are produced by a party, upon a reference, with portions thereof sealed up, his affidavit stating that those portions do not relate to the matters of the reference is to be taken, in the first instance, as sufficient to protect them from examination. But if the adverse party can show any fair grounds for supposing the parts sealed up to be material, the court may order them to be opened.

But before coming to the court for an order directing the opening of those parts of the books which have been sealed up, the adverse party should first apply to the referee for such an order.

IN EQUITY. The bill in this cause was filed to close up the business of a copartnership. On the 24th of September, 1847, an order was made appointing Philo T. Ruggles, Esquire, a receiver of the partnership effects, and also a referee to take and state the partnership accounts, and requiring the parties at his request and under his direction, to deliver over, among other things, all books relating to the partnership. Among the books delivered by the defendant in pursuance of this order, was a *cash book*, some pages of which were sealed up. At the time of producing the book, the defendant made an affidavit upon a blank leaf thereof, stating that those pages which had been sealed up related exclusively to the defendant's private cash account, and his private business since the dissolution of the partnership, and not to the cash accounts or business of Titus & Cortelyou. The draft of this affidavit was produced before the referee and approved by him, as to its form, in the presence of the plaintiff's counsel, and was then engrossed upon the book and sworn to by the defendant, without objection on the part of the plaintiff. Upon an affidavit alleging that those pages of the book which had been sealed up related to the money received by the defendant for debts due to the firm of

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Titus & Cortelyou, an order was obtained by the plaintiff requiring the defendant to show cause why an order should not be made directing that part of the book to be opened. The case now came before the court upon a motion to make the rule to show cause absolute. In opposition to the motion, the defendant produced the certificate of Mr. Ruggles, the receiver and referee in the cause, stating that the plaintiff had not shown before him any ground for supposing that any part of the book which had been sealed up was material, and also the affidavit of Mr. Edwards, his counsel, showing that the pages of the book had been sealed up under his advice, after he had become fully satisfied that all the entries therein had reference to the private business and affairs of the defendant. It also appeared that although the parties had met several times before the referee, the plaintiff had never claimed, before, that the pages which had been fastened down should be opened. A great number of affidavits were read upon the hearing of the motion, shewing the existence of much hostile and angry feeling between the parties, but which it is unnecessary for the understanding of the decision to notice further.

S. F. Clarkson, for the plaintiff.

C. Edwards, for the defendant.

HARRIS, J. It is the right of a party, when required to produce books for inspection, if such books contain accounts and transactions which in no way relate to the subject of examination, to seal up such parts of the books, so that they shall not be exposed to the observation of those who have no right to examine them. Mr. Hoffman, in his excellent treatise on the practice in the master's office, in referring to the production of books, uses the following language. "If books are produced before the master with portions sealed up, the party's oath of their not relating to the matters in question, must be taken in the first instance as sufficient. But if the adverse party can shew any fair grounds for supposing any part has been sealed

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which is material, whether designedly or not, he may require it to be opened. And if this is refused, upon certificate of the master that in his opinion such part should be opened, the court would compel it."

Thus it will be seen, that according to the settled practice in such cases, the plaintiff, before coming to this court for an order directing that part of the book which had been sealed up to be opened, should have applied to the referee in the first instance, for such an order. It appears, however, in this case, that no such application was made; and further, that there was nothing before the referee shewing that such an order would have been proper. But if it were proper to make the application to this court in the first instance, there is nothing in the papers upon which the application is founded to shew that there is any thing material to the matters in question between the parties in those pages of the book which have been closed up, or which would justify the court in making an order to subject those pages to inspection. The only evidence which has been produced to show the materiality of the entries upon those pages, is in the affidavits of Aaron Sutton and John Lloyd, both of whom are shewn by the defendant to have obtained the information they have in relation to the contents of that part of the book which is sealed up, by an examination after the pages had been closed up, and the book deposited with the referee; an act for which they are clearly punishable, as for a contempt. For the court will always protect parties against a violation of rights of this description, by proceeding against the offender, as for a contempt. But the affidavits themselves do not shew enough to justify an order to subject to inspection that part of the books which has been closed up, upon the oath of the defendant, that the entries it contains relate exclusively to his private business.

An order must therefore be entered discharging the order to shew cause; and directing that the plaintiff pay the defendant twenty dollars for the costs of opposing this application.

SAME TERM. *Before the same Justice.*

DUNKIN vs. LAWRENCE.

When an injunction is dissolved upon the matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction ; and the defendant is entitled to a reference to ascertain his damages, under the 31st rule of the late court of chancery, which corresponds with the 21st rule in equity of the supreme court.

But when the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not to be deemed to have been made until the final hearing and decision of the cause.

IN EQUITY. Upon filing the bill in this cause, the plaintiff, with two sureties, executed a bond to the defendant, in the penalty of \$800, conditioned to pay such damages as he might sustain by reason of the injunction to be issued in this cause, if the court should eventually decide that the plaintiff was not equitably entitled to such injunction ; such damages to be ascertained by a reference to a master, or otherwise, as the chancellor or vice chancellor having jurisdiction of the cause in which such injunction issued should direct. The injunction issued upon the filing of this bond, was subsequently dissolved on the matter of the bill only. The defendant now moved for a reference to ascertain and report what damages he had sustained by reason of the issuing of the injunction.

W. T. Horn, for the defendant.

G. Clark, for the plaintiff.

HARRIS, J. I am not aware that any decision has been made by the chancellor, which determines when a party is at liberty to apply for a reference under the provisions of the 31st rule of the late court of chancery, which corresponds in its provisions with the 21st rule in equity of this court. It was my impression, upon the argument of the motion, that the proper construction of the rule would not allow a reference until the

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cause had been finally disposed of upon the merits. I still think this the construction which ought to be adopted, where the injunction has been dissolved upon the coming in of the answer. Although the equity of the bill may be denied in the answer, so as to entitle the defendant to have the injunction dissolved, it may turn out, upon taking the proofs, that the bill was true and the answer false; and in that case it will eventually be decided that the plaintiff was equitably entitled to the injunction. The word "eventually," as used in the rule, and in the condition of the bond, relates to the final decision upon the equity of the bill itself. If the injunction is dissolved upon the matter of the bill alone, it is to be regarded as a final decision, and the court cannot subsequently determine that the plaintiff was equitably entitled to the injunction, without reversing its decision dissolving the injunction. But when the injunction is dissolved upon the bill and answer, and because the answer denies the matters of the bill upon which the injunction rests, it may eventually appear, upon the subsequent hearing of the cause, that the bill was true and the answer false, and although the injunction had been dissolved, yet that in fact the plaintiff was equitably entitled to the injunction. I think, therefore, the true construction and meaning of the rule is, that when an injunction is dissolved upon the matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction; and the defendant is entitled to the reference provided for in the rule. But where the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not to be deemed to have been made until the final hearing and decision of the cause.

In this case, the injunction having been dissolved on the matter of the bill only, the defendant is entitled to an order referring it to Samuel M. Woodruff, Esquire, or any other suitable person to be agreed upon by the counsel for the parties, to ascertain and report the damages he has sustained by reason of the issuing of the injunction.

SAME TERM. *Before the same Justice.*

KOPPEL vs. HEINRICHS and WOLFF.

The general rule, on the subject of jurisdiction, is that it depends upon the state of things at the time the action is brought; and if the circumstances be such, then, as to vest jurisdiction in the court, the same cannot be ousted by any subsequent event.

If there is any exception to this rule, it is when such a change in the parties takes place after the commencement of the suit, as to work an abatement.

The appointment of a person as consul of a foreign power, does not work an abatement of a suit previously commenced against him in a state court.

The privilege conferred upon the consuls of foreign governments, by the constitution and laws of the United States, of being sued in the federal courts only, does not extend so far as to enable a party, after a suit has been commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting the office of consul of a foreign power.

Jurisdiction of the state courts in suits to which foreign consuls are parties, is excluded only in suits against them. They are at liberty to bring suits against other persons, in the state courts, if they choose to do so.

A party who brings a writ of error to the supreme court, to reverse the judgment of a court below, occupies the position of one voluntarily bringing his suit in the higher court, for redress. And by calling upon the supreme court for its decision upon the merits of the cause, he admits its jurisdiction to make such decision; and he is concluded by that admission.

Where, subsequent to the commencement of a suit against a party, in a state court, he accepted the appointment of consul of a foreign power, by virtue of which he became exempted from liability to be prosecuted in the state courts, but he proceeded to trial in the suit, upon the merits, without suggesting his privilege to the court, and afterwards brought a writ of error to the supreme court, to reverse the judgment of the court below; *Held*, that he was estopped from setting up his privilege, in bar of the jurisdiction of the state courts.

THIS was a motion to set aside an execution issued in this cause to the sheriff of Queens, and all other proceedings subsequent to the issuing thereof.

In May, 1840, a suit was commenced by the plaintiff against the defendants, in the New-York common pleas, by declaration. The defendants appeared by attorney, and on the 30th of September in the same year, issue was joined. Upon the trial there was a verdict for the plaintiff, upon which judgment was perfected on the 2d of May, 1843. On the 5th of the same

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month, the defendants brought their writ of error to the late supreme court; and on the 26th of July, in the same year, that court rendered a judgment of affirmance. A writ of error to the court for the correction of errors was subsequently brought by the defendants, and in December, 1845, that court affirmed the judgment of the supreme court. An execution was thereupon issued out of the supreme court, to the sheriff of Queens, with directions to collect \$1273,30, the amount of the judgment in that court, and \$710,39 for the damages and costs awarded by the court for the correction of errors. On the 3d of June, 1846, the sheriff sold certain real estate of the defendant Heinrichs, for the amount of the execution, and executed the usual certificate of sale. On the 2d of November, 1840, the defendant Hienrichs was appointed by the duke of Saxe Altenburgh, an independent sovereign in Germany, his consul for the city of New-York. The appointment was duly recognized by the president's proclamation on the 6th of January, 1841. This motion is now made, upon the ground that, after the appointment of the defendant Heinrichs, the proceedings in the state courts were without jurisdiction.

E. Sandford & George Wood, for the defendants.

E. C. Benedict, for the plaintiff.

HARRIS, J., That the constitution of the United States has conferred upon the federal courts exclusive jurisdiction of suits against foreign consuls is not denied.

But the question now before the court relates to a suit commenced in a state court, before the party claiming exemption as a consul received his appointment, and when the state courts had jurisdiction of the suit, exclusive of the federal courts. That the suit was rightfully commenced in the New-York common pleas, is admitted: and the question now presented for determination is, whether the subsequent appointment of Heinrichs as consul of a foreign government deprived the state court of the jurisdiction which it had thus rightfully acquired;

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or whether, having thus obtained jurisdiction, it was competent for the state court to proceed to consummate its proceedings, notwithstanding the privilege conferred upon the defendant by virtue of his subsequent appointment. The general rule on the subject of jurisdiction is that it depends on the state of things at the time the action is brought; and if the circumstances be such, then, as to vest jurisdiction, the same cannot be ousted by any subsequent event. (*Mollan v. Torrance*, 9 Wheat. 537.) If there can be said to be any exception to this rule, it is when such a change in the parties takes place after the commencement of the suit as to work an abatement. It was insisted by the counsel who argued this motion for the defendant, that the appointment of the defendant as consul had the effect to abate the suit; that thereby he was withdrawn from the jurisdiction of the state courts. But I cannot concur in this view of the question; whether the privilege conferred upon consuls by the constitution and law of the United States is to be regarded as a personal privilege, or the privilege of the sovereignty they represent. I do not think it was ever intended to extend that privilege so far as to enable a party, after a suit commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting an office which, if held at the time the proceeding was instituted, might have been available as a valid objection to the jurisdiction of the court in which the suit was brought. No decision holding such a principle was referred to on the argument, nor do I feel called upon to adopt such a construction of the constitution and laws of the United States affecting ambassadors and consuls. Conceding that the exemption provided in behalf of these officers, is the privilege not of the person but of the state they represent, and that the provision is founded upon considerations of public policy, yet I cannot conceive that it is necessary, in giving effect to this provision, to violate the rule that the question of jurisdiction is to be determined by the state of things existing at the time the suit was commenced.

The case of *Mannhardt v. Soderstrom*, (1 Binney, 138,) was much relied upon in support of the motion. But I cannot

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regard that case as an authority to sustain the position assumed on behalf of the defendants. There the defendant, who was the consul general of the king of Sweden, accompanied his plea with a protestation that "at and before the time of instituting the action he was, and since that time had continued to be, and still was, consul general, &c. and that therefore the court had not jurisdiction," &c. He then made his motion to quash the proceedings. It was shown, in opposition to the motion, that in various instances the defendant had submitted to suits and executions from the state courts. Chief Justice Tilghman, in delivering the opinion of the court, said in reference to the defendant's having submitted to other suits, &c. that it was a sufficient answer to the objection that it did not *appear on the record* that the defendant was a consul, and therefore the court could take no notice of it; but that in the case then before the court, *it appearing upon the record* that the suit was against a consul, jurisdiction was taken away by the ninth section of the judiciary act. Thus it will be seen that the case relied upon is distinguishable from that now before the court, in two essential particulars: first, that the defendant was a consul when the suit was commenced; and secondly, that the fact appeared upon the record.

Again; this suit was originally commenced in the New-York common pleas. It was removed into the supreme court by the defendant himself, who became plaintiff in error. He occupies the position of one voluntarily bringing his suit in this court for redress. Shall he be permitted, after failing in that suit, to have the proceedings declared void on the ground of his privilege as an officer of a foreign government? Jurisdiction of state courts in suits to which foreign consuls are parties, is excluded only in suits *against* them. They are still at liberty, if they choose to do so, to bring suits against other persons, in the state courts. It seems to me, therefore, that even though the defendant's appointment might have furnished sufficient grounds to arrest the proceedings in the common pleas, where he was a defendant, he does not stand in the same position in the court to which he has voluntarily and rightfully applied for

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the purpose of correcting what he deemed an error in the court below. By thus calling upon the supreme court for its decision upon the merits of the cause commenced against him in the common pleas, he admitted its jurisdiction to make that decision ; and whatever might have been his rights in the court below in respect to his appointment as consul, he should be deemed to be concluded in this court by his admission of its jurisdiction, in bringing his writ of error here.

I am also inclined to think that even if the appointment of the defendant as consul, after the suit had been commenced against him, could have been made available to deprive the state court of the jurisdiction it had acquired, yet the objection could only have been properly made by plea, or perhaps upon motion, before proceeding in the cause ; and that having neglected to avail himself of his exemption before proceeding to the trial upon the merits, he precluded himself from afterwards objecting to the jurisdiction of the court. But it is unnecessary to decide this question. It is enough that when the suit was commenced, the federal courts had no jurisdiction either of the defendant or the subject matter of the suit, but that jurisdiction of both belonged exclusively to the state courts ; that the suit was thus rightfully commenced in the New-York common pleas ; that after the appointment of the defendant to the office by virtue of which he now claims exemption, he proceeded not only to a trial in the common pleas upon the merits, without suggesting to the court his privilege, but also brought his writ of error to the supreme court to review the decision of the common pleas. Under these circumstances, he must be deemed to be estopped from setting up his privilege in bar of the jurisdiction of the state courts, if, indeed, he ever had such right. The motion must therefore be denied, with costs.

SAME TERM. *Before the same Justice.*

DICKENSON vs. PHILLIPS and others.

No particular form of words is necessary, to constitute an equitable assignment of a fund. But there must, at least, be evidence of an intention to appropriate the fund. P. being indebted to D. gave him security for the payment of the debt, upon a schooner belonging to him; agreeing, at the same time, that he would procure an insurance upon the vessel, and transmit the policy to the creditor. He subsequently caused the schooner to be insured in the name of G., a third person, and wrote to D. informing him thereof, and stating that G. was to hold the amount of the insurance subject to the order of D. in case of loss; and assuring D. that his interest would at all times be kept covered by insurance. The debtor also told another person that he had directed G. to pay the proceeds of the policy to D., but there was no evidence that he had done so; *Held* that these representations and assurances merely showed an *intention* on the part of P. to appropriate the avails of the insurance to D.'s benefit; and that they did not amount to an equitable assignment to D. of P.'s interest in the proceeds of the policy, so as to give D. a specific lien thereon.

The distinction between those cases in which the transaction has been held to constitute an equitable assignment of a fund, and those in which it has been held not to constitute such an assignment, depends upon the question whether the party having the control of the fund intended, in fact, to make an absolute appropriation of it, or whether he intended himself to retain the control of it; *it seems*.

In order to constitute a specific appropriation of a particular fund to the payment of a specific debt, an intention to surrender to the creditor all control over the fund, is necessary.

Where a debtor gives to his creditor an order upon one indebted to him, requesting him to pay to the creditor the amount of his debt, such order will be construed as an equitable assignment of the debt; even though the drawee had never assented thereto.

IN EQUITY. On the 6th of September, 1843, the defendant Phillips, being indebted to the plaintiff in the sum of \$3500, gave to him five drafts upon J. Cohen, jun., of Charleston, S. C. for the amount of the indebtedness, and also gave him security for the debt upon the schooner Eliza Jane, of which he was owner and master, by an instrument alleged by the plaintiff to have been intended as a mortgage, and by the defendants Newbold & Cruft to have been a bottomry bond. The transaction took place at Boston. Phillips being a resident of Brewer in the state of Maine, and the plaintiff residing at Wilmington,

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North Carolina. The premium reserved in the bond executed by Phillips to the plaintiff, was 12 per cent; and it was agreed between the parties, at the time of giving the security, that Phillips should procure insurance upon the vessel in the state of Maine, and pay the premium, and transmit the policy to the plaintiff; and that this policy when received, should be in lieu of *marine interest*. On the 29th of September, Phillips wrote to the plaintiff from Bangor, apprising him that the drafts on Cohere would not be accepted, and saying, "I shall keep the schooner insured for your protection and myself." No insurance was effected on the vessel until the 7th of February, 1844, when, being at New-Orleans and about to sail for New-York, she was insured by the Hartford Protection Insurance Company for \$3500 during her voyage to New-York and on her return to and at New-Orleans, *loss, if any, payable to Levi H. Gale.*" On the 26th of February, 1844, Phillips wrote to the plaintiff from Mobile, saying, "*I have got the schooner insured in New-Orleans for \$3500 by the house of Mr. L. H. Gale; he to hold the amount subject to your order in case of loss. You may be assured your interest will at all times be kept covered by insurance.*" On the last mentioned day, the plaintiff caused the vessel to be insured at Baltimore, for the same amount, "at and from New-Orleans to New-York," for his own benefit. On the 6th of March following, the plaintiff wrote to Gale at New-Orleans, stating as follows: "Capt. Phillips informs me he had insurance made on the schooner, through you, for \$3500, with instructions to hold the amount in case of loss, subject to my order, which please confirm in your answer. I hold a respondentia bond on the E. Jane for \$3500 which will explain my interest in the matter." And on the day following, he again wrote to Gale a letter, in which he informs him that the schooner had put in at Charleston in distress, with the loss of deck load, sails, &c. and would likely be condemned. He adds, "you will therefore hold the policy on the vessel for my benefit under my respondentia bond, and be good enough on receipt of this, to state if the vessel was valued as well as insured at \$3500." On the 15th of March, Gale wrote to the plaintiff in-

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forming him that the freight of the vessel on her voyage to New-York, amounted to \$1051,82, against which a draft had been drawn at 60 days for \$940, on Messrs. Newbold & Cruft, the consignees in New-York, and they had secured themselves by effecting insurance on the freight. He further says, "insurance is effected here for \$3500 for the voyage from this port to New-York and back." On the 6th of February, 1844, Phillips made his drafts at 60 days, on Newbold & Cruft, for \$940, in favor of Gale, on account of disbursements of schooner *Eliza Jane*; and on the same day Gale wrote to Newbold & Cruft apprising them of the draft and consignment of the vessel to them, and requesting them to insure the freight for \$1000. The draft was accepted, and paid by the drawees. The vessel sailed from New-Orleans on the 12th of February, and having met with disasters, a part of her cargo was *jettisoned*, and she put into Charleston in distress. The cost of repairing and refitting amounted to about \$4000; to pay which, a portion of the cargo was sold, and for the residue of the expense the vessel was put under a bottomry bond. Having arrived at New-York, with a small portion of her cargo, on the 10th of May, proceedings were there instituted to enforce the Charleston bottomry bond; and the vessel was sold without producing any surplus for the plaintiff.

On the 6th of May, Gale enclosed the policy of insurance to Newbold & Cruft, requesting them to present the necessary documents to the insurance company, and collect what was due upon the policy. And he directed them, if there should be any balance in their hands, to hold the same *subject to his order*. The instructions contained in this letter were confirmed by Phillips. On the 27th of the same month Newbold & Cruft settled the claim with the insurance company, and received \$2500,62 in full, and cancelled the policy. On the following day they forwarded to Gale their account; crediting the amount received upon the policy, and charging the draft for \$940 paid by them, and various other items, amounting in the whole to \$1106,76, and leaving in their hands, to the credit of the schooner and the owners, a balance of \$1393,90. On the 6th of June, Gale

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wrote to Newbold & Cruft enclosing two protested drafts drawn in his favor by Phillips, amounting to \$440, to be paid out of the proceeds of the policy. On the 13th of July, Newbold & Cruft remitted to Gale the amount of his drafts, and paid to the attorneys for the plaintiff the balance in their hands, amounting to \$993,88. This bill is filed to obtain a decree against Newbold & Cruft for the balance of the insurance money retained by them in payment of the \$940 draft which had been accepted and paid by them. The bill was taken as confessed by Phillips and Gale, as absent defendants. The cause was heard upon pleadings and proofs as to the defendants Newbold & Cruft.

T. Sedgwick & C. B. Moore, for the plaintiff.

D. Lord & D. D. Lord, for Newbold & Cruft.

HARRIS, J. I am inclined to think the plaintiff's security upon the vessel is to be regarded as a bottomry bond, and not a mortgage. But in the view I have taken of the questions involved in this case, it is not necessary to decide whether it was the one or the other. It is enough that there was a debt due from Phillips to the plaintiff, for which he held security upon the vessel. The insurance, though in the name of Gale, was for the benefit of Phillips. Though by the terms of the policy the loss, if any, was payable to Gale, these words merely constituted him the attorney of Phillips, or such other person as he should appoint, to receive the moneys payable upon the policy, in case of a loss. Phillips, then, is to be regarded as the party insured; with full power to transfer his interest in the policy as he should see fit. The question, upon the decision of which this case must depend, is whether he has in fact made such a transfer to the plaintiff. If he has, then the defendants Newbold & Cruft are liable to the plaintiff for the balance of the moneys received by them upon the settlement with the insurance company, after deducting their expenses and commissions. On the other hand, if, when those moneys were received, no valid

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transfer had been made by Phillips, they had a right to retain in their hands the balance due them from Phillips. To sustain his claim to the fund, the plaintiff relies chiefly upon the letter of the 26th of February, in which Phillips informs the plaintiff that Gale was to hold the amount of the insurance subject to his order; in connection with the subsequent declaration of Phillips to the witness De Peyster that he had directed Gale to pay the proceeds of the policy to the plaintiff. This, it is contended, amounts to an equitable assignment of Phillips' interest in the policy. Without stopping to inquire whether these *declarations* of Phillips are competent evidence as against Newbold & Cruft, I cannot regard them as sufficient to establish the plaintiff's position, that he acquired thereby an equitable lien upon the funds in question. All that is proved, by the testimony, is that the plaintiff was informed by Phillips that he had instructed his agent, in case of loss, to hold any moneys he might receive for him upon the insurance, subject to the plaintiff's order. Whether any such directions were ever in fact given to Gale, does not appear. So far as there is any evidence on the subject, it would seem that Phillips had never given any such directions; for when called on by De Peyster he professed a readiness to pay the proceeds of the policy to the plaintiff, if he was authorized to receive such proceeds; and offered, upon the production of the letter of the 26th of February, or an order from Phillips to the same effect, to direct the payment of the insurance money to the plaintiff. The plaintiff's case then stands upon the mere declaration of Phillips that he had appropriated the fund to the payment of his debt.

It is true that no particular form of words is necessary to constitute an equitable assignment. But there must at least be evidence of an intention to appropriate the fund. If Phillips, instead of writing to the plaintiff that Gale was to hold the insurance money subject to his order, had in fact given him an order upon Gale for such money, it might, perhaps, have had the effect to give him a specific lien upon the fund; though I think even that would not have been sufficient. Such an order would have contained what is not proved in this case, a direc-

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tion to pay, as well as the power to receive. I am unable to distinguish this case, in principle, from that of *Rogers v. Hosack's Executors*, decided by the court for the correction of errors, (18 Wend. 319.) There, it was held that an agreement to pay certain debts out of a particular fund, without any words of transfer, and without any power or authority to receive such fund, could not be construed to give such creditors a specific lien upon the fund. So, in this case, the most that the plaintiff can claim is, that he has shown an intention on the part of Phillips to appropriate the avails of the insurance he had effected, to the plaintiff's benefit. As in the case of *Rogers v. Hosack's Executors*, there is no pretence that any words of transfer were used, or that any authority was given by Phillips to collect the insurance money in case of loss. On the contrary, the letter itself upon which the plaintiff relies, shows that it was contemplated that the fund was to be received by the agent of Phillips himself. At the most, the evidence in the case only shows that Phillips gave the plaintiff repeated assurances of his intention to keep the vessel insured for his benefit. Such assurances cannot, I think, operate to give the plaintiff a specific lien upon the proceeds of the policy. It may well be that Phillips honestly intended that the fund should be applied to the payment of his debt to the plaintiff; and if Phillips had directed the insurance company to pay the money to the plaintiff, such order might have constituted an equitable assignment which a court of equity would enforce. But no such directions were given. On the contrary, Phillips retains the right, through his agent, to collect the money himself. And even if it had appeared that he had in fact given to his agent the instructions mentioned in the letter of the 26th of February, it might well be contended that such instructions amounted to nothing more than a mere mandate from a principal to his agent; which might be revoked at any time before it was executed—or at any rate, at any time before any engagement should be entered into by the agent to execute it for the benefit of the party in whose favor it was given. Such instructions, if any were ever given, were in fact revoked, by the letter of the 6th of May, approved by Phil-

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lips enclosing the policy to Newbold & Cruft for adjustment and payment. By an endorsement upon the policy itself, Newbold & Cruft are authorized to receive from the insurance company the amount due thereon. And the letter directs them, in case there should be a balance in their hands, to hold the same subject to the order of Gale. This was a disposition of the fund, at least so far as relates to that portion of it now in question, inconsistent with its appropriation to the payment of the plaintiff's debt; and was therefore, in effect, a revocation of any instructions previously given, if indeed any such ever were given, to pay the proceeds of the policy to the plaintiff.

The case of *Clayton v. Fawcett*, (2 Leigh's Va. Rep. 19,) cited with approbation, by Senator Dickinson, in delivering the opinion of the court in the case of *Rogers v. Hosack's Executors*, is a stronger case than that under consideration, in favor of sustaining the doctrine of equitable appropriation as applicable to such a case. There Fawcett had placed a bond in the hands of his agent for collection; and being indebted to Clayton, he gave him a letter addressed to his agent, directing him to pay the money to Clayton when collected, if he should not happen to be present. Fawcett having died, the question arose between his representatives and Clayton, whether this letter to the agent of Fawcett amounted to an equitable transfer of the money. The chancellor held that no such construction could be given to it, and his decision was affirmed by the court of appeals. In that case, the letter to the agent of Fawcett was but an authority to him to pay the money to Clayton; and not being accompanied by an assignment, and not having been executed at the time of the death of Fawcett, such death operated as a revocation of the authority; and the money in the hands of the agent became a part of Fawcett's estate. The distinction between those cases in which the transaction has been held to constitute an equitable assignment, and those in which it has been held not to constitute such an assignment, seems to depend upon the question whether the party having the control of the fund intended in fact to make an absolute appropriation of it, or whether he intended himself to retain the control of it.

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Thus in *Clayton v. Fawcett*, instead of giving Clayton an order upon his debtor for the payment of the money, which would have amounted to an appropriation of the fund specified in the order, he gave him a letter to his own agent, for the payment of the money, when collected. So in the case of *Rogers v. Hosack's Executors*, Gracie, instead of giving his creditors, themselves, authority to collect the money due him on account of claims upon the French government, himself retains the power to collect the money, and only promises that he will pay the creditors out of the money when collected. On the other hand, when, as in *Yeates v. Grover*, (1 Ves. jun. 280,) a debtor gives to his creditor an order upon one indebted to him, requesting him to pay the amount of his debt, such order will be construed as an equitable assignment of the debt; even though the debtor upon whom it is drawn had never assented thereto. In every case I have been able to find, where a debtor has been held to have made a specific appropriation of a particular fund to the payment of a specific debt, an intention to surrender to the creditor all control over the fund has been shown.

In any view I have been able to take of this case, whether the plaintiff's security upon the vessel is to be regarded as a bottomry bond or a mortgage—or whether the declarations of Phillips, by his letter on the 26th of February, and to the witness De Peyster, are competent evidence against Newbold & Cruft, or not—or whether or not he gave to his agent such instructions as are mentioned in the letter of the 26th of February, I cannot regard the plaintiff as having obtained a specific lien upon the proceeds of the policy. The bill must therefore be dismissed as against Newbold & Cruft, with costs.

SAME TERM. *Before the same Justice.*

WENDELL vs. SHAW.

Where a creditor's bill calls upon the defendant to state whether, at the time of filing such bill, he possessed, owned, or had any interest in, any real estate, or chattel real, or any personal property, an answer stating that since the recovery of the plaintiff's judgment the defendant *had not been interested in any property* of any kind; and that no person had held any real estate or personal property, or interest therein, in trust for him, or for his benefit, in possession or otherwise, is to be regarded as substantially meeting the inquiry.

Where the bill requires the defendant to state the situation of his property and effects at the time of filing the bill, and the defendant answers that *at the time of the rendition of the plaintiff's judgment* he had no interest in any property, *and that he had not had, at any time since*, this is a sufficient answer to the inquiry.

IN EQUITY. Exceptions to the answer of the defendant for insufficiency. The bill is a creditor's bill in the usual form. The grounds of the exceptions will appear in the opinion of the court.

P. Y. Cutler, for the plaintiff.

L. Gardinier, for the defendant.

HARRIS, J. The plaintiff insists, in the first clause of his first exception, that the defendant has not sufficiently answered with reference to the time of filing the bill in this cause, whether *he possessed, owned, or had any interest, in any real estate, or chattels real, or in any personal property, in possession, reversion, or remainder, of any name or kind.* The answer, though inartificially drawn, states that since the recovery of the judgment upon which the bill was filed, the defendant *had not been interested in any property* of any kind, and that no person had held any real estate, or personal property, or interest therein, in trust for him, or for his benefit, in possession or otherwise, either by deed, assignment, or in any other manner, except as before stated in the answer. I think these statements in the answer must be regarded as substantially meeting the

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charge in the bill, upon which this branch of the first exception is founded.

The remainder of the first exception seems to relate to the form of the answer, so far as it purports to state the situation of the defendant's property and effects, at the time of filing the bill. The answer states that *at the time of the rendition of the judgment, the defendant had not, and that he had not had, at any time since, any interest, &c.* The plaintiff insists that this form of statement is not sufficient, but that the defendant should state expressly that at the time of filing the bill he had not any interest, &c. That mode of answering is certainly to be recommended, as meeting more directly the allegations and charges of the bill; but I am inclined to think it is sufficient for the defendant to state a time anterior to the filing of the bill, and with respect to which the plaintiff has thought fit also to interrogate him, and instead of repeating that he had no property at the time of filing the bill, after having denied owning any at such anterior time, to say that he had not had any at *any subsequent time*; thus *necessarily* embracing the time of filing the bill. The whole of the first exception must therefore be disallowed. For the same reason the whole of the second exception must be disallowed, except so much as relates to the charge that at the time of filing the bill, the defendant had money, or bank notes, or bills, or notes of some kind or other, which were intended to pass as money. The matter of this clause of the exception has only been answered by the defendant with reference to the time of putting in his answer. And the defendant not having stated whether, at the time of filing the bill, he had any money, or bank bills, or notes of any kind, or which were intended to pass as money, in his possession or under his control, that part of the second exception should be allowed; but inasmuch as the whole of the fifth exception, which includes the same matter, must be allowed, it is proper to disallow the entire second exception.

The third, fourth, and seventh exceptions, are also disallowed, for reasons stated in reference to the first and second excep-

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tions. And upon similar grounds, the fifth and sixth exceptions must be allowed.

The defendant having succeeded as to a majority of the exceptions, is entitled to costs against the plaintiff. But under the provisions of the 53d equity rule, the plaintiff is also entitled to the costs of the exceptions which have been allowed. The order must provide that the costs to which the defendant is entitled, be set off against the plaintiff's costs.

SAME TERM. *Before the same Justice.*

SAYRE vs. PECK.

Upon the dissolution of a copartnership between S. & P. an agreement was entered into by them, by which it was stipulated that the business of the firm should be settled by S., and that all the personal property, books and effects of the firm should be delivered over to him, and that he should provide for, and pay, all the debts and liabilities, and charge the same to the firm. By the fifth clause of the agreement, it was provided that when all the debts and liabilities of the firm should be paid and discharged, then the accounts of the partners should be made equal by S. selecting and taking to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of the partners, with interest, (P. being indebted to the firm;) and that the balance of the assets and property of the firm should belong to, and be immediately divided equally between the parties. At the time the agreement was executed, the effects of the partnership exceeded, by more than \$26,000, its debts and liabilities. And the parties did not contemplate a deficiency of assets to pay the debts and equalize the partnership accounts. All the debts having been paid, debts to the amount of about \$26,000 still remained due to the firm, most of which were uncollectible. A balance of \$1568.98 being still due from the firm to S., he filed his bill against P., praying for an account and a settlement of the copartnership affairs, and that P. might be decreed to pay the balance which should be found due from him. *Held* that there was nothing in the language of the agreement which furnished any evidence that S. intended to release P. from his liability to contribute his share towards the losses of the partnership; or that P. was stipulating for an indemnity against his liability to pay any balance which might be justly due from him to his copartner, after a full administration of the partnership effects. Nor that either party intended, or expected

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S. would take to his own account, in payment of any portion of the amount due him from the partnership, doubtful or uncollectible debts, at their nominal value.

Held also, that the deficiency of the partnership effects to pay the debts and liabilities of the firm, and then to pay S. the amount which should be due to him from the firm, was assumed as the basis of the agreement. That those effects having turned out to be insufficient for those purposes, it was a case of mutual mistake or misapprehension as to the value of those effects. And that it would be doing violence to the intention of the parties to make the agreement applicable to the existing state of things.

Where a written contract is capable of a sensible construction, and there has been no fraud or imposition in obtaining it, such construction must be determined by the language found in the instrument itself, and cannot be affected by parol evidence of what was said by the parties at, or before, the time of execution.

IN EQUITY. On the second day of March, 1839, the plaintiff and the defendant entered into copartnership as merchants, under the firm of "Peck & Sayre." Peck was to furnish \$10,000 capital, and Sayre \$15,000. The profits and losses of the partnership were to be shared and borne equally. The partnership having been dissolved, the following agreement was executed by the parties on the 23d day of January, 1843.

"Whereas the copartnership heretofore existing between the subscribers, John Peck and David L. Sayre, under the firm of Peck & Sayre, has been dissolved by its own limitation: now in consideration of the premises and of one dollar by each to the other in hand paid, the said John Peck and David L. Sayre covenant and agree with each other as follows. First. That the business of the said firm of Peck & Sayre shall be exclusively settled by said Sayre; who, for this purpose is to use the name of the said firm in liquidation. And all the personal property, books, and effects of said firm are to be delivered over to and taken charge of by said Sayre, for the benefit of said firm, and the said Peck is not to collect or receive any of the debts due to said firm. Second. All the debts and liabilities are to be provided for and paid by said Sayre and charged by him to said firm. Third. All shipments or consignments of goods to said firm, not yet received, but that may hereafter arrive, are to be received by said Sayre on his own account; and all acceptances or any liability that said firm may have come under, or incurred, against or on account of said shipments or

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consignments not yet arrived are to be provided for and paid by said Sayre individually. Fourth. Neither of said partners is to draw or receive any thing from said firm for his individual use until all the debts and liabilities of the firm are paid. Fifth. When all the debts and liabilities of said firm are paid and discharged, then the accounts of said partners are to be made equal by *said Sayre selecting and taking to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of said partners with interest, (said Peck being now indebted to the firm,) and the balance of the assets and property of the said firm is to belong to and be immediately divided equally between said Peck and Sayre.* Sixth. The books and papers of said firm are to be kept by said Sayre at his store or office, and said Peck or his agent or personal representatives, is, or are, at all times to have free access to them during the usual business hours; and may examine such books, and make such extracts or copies from them as he or they may see fit. Seventh. Said Sayre covenants and agrees to apply the effects and property of said firm as above specified. Eighth. Said Peck hereby irrevocably authorizes and empowers said Sayre to use his name or the name of said firm for the purpose of instituting suits, or any other purpose that may be deemed necessary and proper, in the liquidation and settlement of the business of said firm. Ninth. Said Sayre is not to receive any compensation for his own services in settling the business of said firm, nor is he to make any charge for clerk hire; but is to be allowed all other necessary and proper charges and expenses. It is understood that under the foregoing agreement said Sayre is not to compromise or settle any debt due or owing to said Peck & Sayre for less than its face without the consent of said Peck; provided said Peck is then in this state, otherwise said Sayre is to have full power to compromise as he may see fit."

At the time of the dissolution a statement of the affairs of the partnership was made, which shewed that Peck was indebted to the firm \$20,023.43, and that the firm owed Sayre \$5377.39. The debts due the firm amounted to \$73,568.25, and the out-

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standing debts against the firm were \$47,241.39. Under the agreement of the 23d of January, 1843, Sayre proceeded to pay off the debts of the firm, and at the time of filing the bill in September, 1845, all the debts had been paid, and the amount due to Sayre from the partnership had been reduced, by collections, to \$1568.28. About \$26,000 still remained due to the firm, most of which was uncollectible. The bill prayed for an account and a settlement of the copartnership affairs, and that Peck might be decreed to pay the balance which should be found due from him. The cause was heard upon pleadings and proofs.

C. O'Connor & P. Callaghan, for the plaintiff.

Murray Hoffman, for the defendant.

HARRIS, J. The only question in this case is, what effect shall be given to the fifth clause in the agreement of the 23d of January, 1843, which provides that, after the plaintiff shall have discharged all the debts and liabilities of the partnership, "the accounts of the partners shall be made equal by said Sayre selecting and taking to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of said partners, with interest." The defendant insists that, by this agreement, he was discharged from all personal liability to the plaintiff for any deficiency of partnership effects to pay the debts and equalize the accounts of the partners. On the contrary, the plaintiff insists that the agreement only related to the administration of the affairs of the partnership, and was not intended to change or affect the rights of the parties upon a final settlement of their partnership business. What, then, is the construction to be given to this clause of the agreement? It is stipulated in the articles of copartnership, that the profits of the business shall be equally divided, and the losses equally borne, by the parties respectively. The final settlement was to be upon the basis of equality; the same rule which this court would have prescribed, in the absence of any

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agreement of the parties on the subject. This rule must still prevail, unless it is made satisfactorily to appear that the parties themselves have agreed upon different terms of settlement. In giving a construction to the terms which the parties have employed to express their agreement, it is proper to look at the state of things existing with reference to the subject matter of the agreement, at the time it was made. If we do so, we find that the effects of the partnership exceeded, by more than \$26,000, its debts and liabilities. And there is nothing to show that the parties contemplated that under any circumstances, there could be a deficiency of assets to pay the debts and equalize the partnership accounts. It seems very clear that the agreement was based upon the assumption of a sufficiency of partnership effects to carry its provisions into effect. There certainly is nothing in the language of the agreement which furnishes any evidence that the plaintiff intended to release the defendant from his liability to contribute his share towards the losses of the partnership; or that the defendant was stipulating for an indemnity against his liability to pay any balance which might justly be due from him to his copartner, after a full administration of the partnership effects. Nor is there any thing to show that either party intended, or expected, the plaintiff would "take to his own account," in payment of any portion of the amount due him from the partnership, doubtful or uncollectible debts, at their nominal value. A state of things is now shown to exist, which was not anticipated by the parties when they executed the agreement, and to which, therefore, the agreement cannot, upon well settled principles, be made applicable. It is a case of mutual mistake, or misapprehension, as to the value of the partnership effects to be disposed of under the provisions of the agreement. The sufficiency of those effects to pay and discharge the partnership debts and liabilities, and then to pay the plaintiff the amount which should be due to him from the firm, is assumed as the basis of the agreement. And now, when it appears that the parties were mistaken in this assumption, it would be doing violence to their intention,

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to make the agreement applicable to the existing state of things. (1 *Story's Eq. Juris.* §§ 142, 143, 144.)

The parol evidence which has been produced by the parties to show what was their understanding when the agreement was executed, is clearly inadmissible. The wisdom of the rule which confines parties to their written contracts, in exclusion of all anterior verbal communications, is strongly illustrated in this very case. Mr. Havens, one of the counsel for the parties, who prepared the agreement of the 23d of January, and who is the subscribing witness thereto, understood from the parties, at the time, that the assets or effects to be taken by Sayre to his own account, were to be so taken, not at their nominal or par value, but at their *actual* value. While, on the other hand, Mr. Griffin, the partner of Mr. Havens, with whom the parties also consulted in relation to the transaction, understood that Sayre was to take his pay in assets of the partnership, without recourse to the defendant in any event. All the witnesses who have spoken on the subject agree, however, that the partnership effects were supposed to be sufficient to pay the debts, and make up the amount of the defendant's deficiency. This fact will assist in accounting for the witnesses differing so widely in their understanding of the intention of the parties. It cannot be necessary to refer to authorities to show, that where a written contract is capable of a sensible construction, and there has been no fraud or imposition in obtaining it, such construction must be determined by the language found in the instrument itself, and cannot be affected by parol evidence of what was said by the parties at or before the time of execution. The law considers the written instrument, solemnly sanctioned by the signatures of the parties, as much safer evidence of the real intention of the parties, than any account given of the transaction by those who happened to be present, whose memories may be frail and fallible, whose minds may be influenced by prejudice and partiality, and who may have incorrectly apprehended the intention of the parties.

It was sought by the counsel for the defendant to take this case out of the general rule in relation to the effect of parol ev-

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idence, by referring to the particular frame of the pleadings. It is true, that the intention of the parties in respect to the matters contained in the fifth clause of the agreement of the 23d of January, is put at issue by the bill and answer; but I cannot see how this fact can render competent, testimony which would otherwise be inadmissible. The rule must still be applied, that where there is a writing expressing the contract of the parties, that alone shall be proof of their intention. The case of *Coutts' Trustees v. Craig*, (2 *Hen. & Munf.* 618,) which was relied upon by the defendant's counsel, does not, I think, sustain his position. In that case, a bill was filed for the specific performance of a contract for the sale of land. The defendant denied that the contract embraced as much ground as was contended for by the plaintiff; and upon such an issue it was held that parol evidence might be resorted to, not to vary the effect of the contract itself, but to supply the facts necessary to give effect to the intention of the parties as it appeared upon the face of the contract.

But even if parol evidence were admissible to show what was the actual understanding of the parties, I do not think the defendant has succeeded in showing satisfactorily that the construction of the writing is in accordance with the actual agreement of the parties at the time the writing was made. The most, I think, that can be made of the testimony is, that it leaves the question as to the real agreement of the parties extremely doubtful; and then the fair inference would be, that the writing expressed such agreement exactly as the parties understood it to be.

I have purposely omitted any reference to the statement contained in exhibit No. 4, which purports to show the condition of the partnership affairs on the first of July, 1844, and in which the plaintiff is charged with the debts then estimated to be good. I have no intention to express any opinion with reference to the effect of that paper, further than to say, that I think it has no proper bearing upon the construction to be given to that clause of the agreement of the 23d of January, under consideration.

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If upon a reference, it shall appear that the plaintiff intended, when this statement was made, "to take to his own account" the good debts mentioned in that statement, amounting to \$14,410,62, it might perhaps properly be regarded as an execution of the agreement, to that extent.

There must be the usual decree for an account. And for that purpose, J. Newland Cushman, or any other suitable person, to be agreed on by the parties, may be appointed a referee. The pleadings and proofs may be used by either party on the reference. The question of costs, and all further directions, are to be reserved until the coming in of the report.

SAME TERM. *Before the same Justice.*

TAYLOR and wife vs. FLEET and TAYLOR.

Where a person about to purchase a farm was ignorant of the actual character and capabilities of the land, and had no means of obtaining such knowledge except by information to be derived from others; and the owner, with a knowledge that the purchaser's object was to obtain an early farm, and that his farm was not as early as the lands lying in the neighborhood, represented to such purchaser "that there was no earlier land any where about there," and the latter, relying upon the truth of that representation, made the purchase; and after ascertaining by actual experiment, that the land was not what it had been represented to be, he applied to the vendor, within a reasonable time, to rescind the bargain, who refused to do so; *Held*, that this furnished a sufficient ground for the interference of a court of equity, to rescind the contract; even though there was no intention on the part of the vendor to deceive the purchaser.

Whatever may have been the motive of a vendor in making erroneous representations respecting land about to be sold by him, it is enough to entitle the purchaser to relief, that there was a misrepresentation of a matter of fact, material to the subject of negotiation, and which constituted the very basis of the contract.

It is a well settled doctrine, in equity, that a mutual mistake of facts, though such mistake may have been innocently made, is a sufficient ground to avoid a contract.

To avoid a contract on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but

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the purchaser must have made the contract upon the faith and credit of such representations. At least, he must so far have relied upon them as that he would not have made the purchase if such representations had not been made.

If a purchaser has acted upon his own judgment, and has not been influenced by the misrepresentations of the vendor, however untrue they may have been, he has no right to be released from his bargain.

Where a purchaser applies for a rescision of a contract, on account of the false representations of the vendor, it is not necessary he should prove the express representations stated in the bill of complaint. It is sufficient to prove words of equivalent import.

Where, between the time of making a contract of purchase and applying to rescind it, great changes have taken place in the character and value of the property, the lapse of time is an important consideration. But where no material change in the property has occurred, and it may be restored in as good a condition as when the purchaser received it, and he has offered to rescind the contract within a reasonable time, the lapse of time furnishes no well grounded objection to a bill for a rescision.

IN EQUITY. This was a bill filed by the purchaser, to rescind a contract for the sale and purchase of a farm. The vendor also filed a cross-bill for the foreclosure of a mortgage, executed by the purchaser, for a portion of the purchase money. The facts upon which the sale was sought to be set aside, are stated in the opinion of the court.

William Curtis Noyes, for the plaintiff.

John A. Lott & C. D. Sackett, for the defendants.

HARRIS, J. Upon a careful examination of the evidence in this cause, I think the following facts are established. (1.) That the object of Taylor in making the purchase in question was to obtain a farm adapted to the business of raising early vegetables for the New-York market, and that at the time of the sale, Fleet, the vendor, was apprised of such object. (2.) That the land in question is not, in fact, as well adapted to the purpose for which it was purchased by Taylor, as other land in its immediate vicinity; that the crops upon the lands spoken of by the witnesses as the shore lands, mature a week or ten days earlier than the crops upon this farm; and for this reason, the annual value of the use of this land is but about half that of

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the shore lands. (3.) That Taylor was ignorant of the actual character and capabilities of the farm, and had no means of obtaining such knowledge, except by information to be derived from those who, from their own observation and experience, were able to give such information. (4.) That Fleet, with a knowledge that Taylor's object was to obtain an early farm, and that his farm was not as early as the shore lands lying in the same neighborhood, represented to Taylor, when inquired of by him in relation to the quality and capability of the land, that "*there was no earlier land any where about there ;*" and that Taylor made the purchase, relying upon the truth of this representation. (5.) That within a reasonable time, after he had ascertained by actual experiment, that the land was not what it had been represented to be, Taylor applied to Fleet to rescind the bargain. It only remains to ascertain what are the rights of the parties, upon the principles of equity applicable to such a state of facts. In the view I am disposed to take of this case, it is not necessary to decide whether the representations made by Fleet were fraudulently made, or not. It is quite possible that, knowing, himself, that the shore lands were in fact *earlier* than the farms situated as his was at a distance from the water, when he made the statement that "his farm was the best adapted for the purpose of raising early vegetables for the New-York market, and that there was no earlier land any where about," he intended only to speak of lands in the vicinity of his farm similarly situated. But he did not so qualify his representations. And whether he intended it or not, he used language which was calculated to mislead Taylor, and to induce him, ignorant as he was of the difference between the shore lands and those situated as Fleet's were, to believe that the farm for which he was negotiating would enable him successfully to compete with any other farms in that neighborhood in the business in which he proposed to engage. If this be so, it furnishes sufficient ground for the interference of a court of equity, even though there was no intention on the part of the vendor to deceive the purchaser. Whatever the motive of the vendor, it is enough that there was a misrepresentation of a

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matter of fact, material to the subject of negotiation and which constituted the very basis of the contract. It is a well settled doctrine in equity, that a mutual mistake of facts, though such mistake may have been innocently made, is a sufficient ground to avoid a contract. If, then, the vendor in this case, intending only to speak of lands in the neighborhood of his own, and similarly situated, has, nevertheless, made representations which have had the effect to mislead the purchaser in respect to a matter not only material in itself, but constituting the essence of the contract, however innocent he may be of any fraudulent intent, it furnishes sufficient ground for avoiding the sale. In *Doggett v. Emerson*, (3 *Story's Rep.* 733,) Mr. Justice Story states the principles by which courts of equity are to be governed in such cases, in the following elegant and forcible terms: "It is equally promotive of sound morals, fair dealing, and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is usually immaterial, whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain." If I am right, then, in the conclusion of fact at which I have arrived, that the vendor in this case represented to the purchaser that the land in question was as early as any land on that end of Long Island, and that this representation was a principal inducement to the purchase, and that such representation was in fact untrue, it follows that the purchaser is entitled to have the contract rescinded. The representation being untrue and infa-

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ential, vitiated the transaction, whether such representation was "wilfully and designedly false, or ignorantly or negligently untrue." (See also opinion of Mr. Justice Woodbury, in *Warner v. Daniels*, 9 *Law Reporter*, 160; 1 *Story's Eq. Jur.* § 193; *Hough v. Richardson*, 3 *Story's Rep.* 659.)

It was much insisted, on the argument, by the counsel for the vendor, that, conceding the representations made by the vendor to have been untrue, the purchaser did not rely upon those representations, but himself took the precaution to examine the land. It is undoubtedly true, that to avoid a contract on the ground of misrepresentation, there must not only be a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have made the contract upon the faith and credit of such representations. At least, he must so far have relied upon them as that he would not have made the purchase if such representations had not been made. If the purchaser has acted upon his own judgment and has not been influenced by the misrepresentations, however untrue they may have been, he has no right to be released from his bargain. But I cannot concur with the counsel for the vendor in his position that the purchaser examined the land with a view to test the accuracy of the representations made by Fleet. On the contrary, all the witnesses agree that no personal examination of the land would enable any person, not previously acquainted with its capabilities, to determine whether the statements made by Fleet were true or not. The only means of knowledge within his reach was information to be obtained from those whose experience enabled them to speak from actual observation, with respect to the material question which constituted the object for which the purchase was made. I cannot think the purchaser was bound to distrust the statements made to him by the vendor, so far as to extend his inquiries to other persons, to test the truth of what he had been told. The vendor ought not now to be allowed to say that the purchaser placed too much reliance upon what he had told him. He had a right to take him at his word, and to make the purchase upon the faith of the truth of the representations which the vendor

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chose to make, relying upon his right to avoid the sale if such representations, in any material matter, should prove to be untrue. Nor can I agree with the counsel for the vendor, that the case, as proved, varies essentially from that made by the bill. The allegation in the bill is, that Fleet represented the land to be full as early, if not earlier, than any land on that end of Long Island, and as well adapted to the raising of all sorts of early vegetables, fruits and market produce, as any other land on that end of the island. The witness, Henry A. Ovington, swears that he represented the land as being the best adapted for the purpose of raising early vegetables for the New-York market; and stated that there "was no earlier land any where about." William H. Ovington says, that Taylor expressed his wish to obtain the earliest land there was, for the purpose of market gardening, and that Fleet said this land was as early as any that could be obtained, or words to that effect. I cannot doubt that the fair construction of the language used by Fleet, as proved by these witnesses, sustains the allegation upon which the bill is founded, that Fleet represented the land to be as early, if not earlier, than any land on that end of the island. It is not necessary that the express words stated in the bill should be proved. Such strictness is not required, even in an action at law founded on a warranty. (*Chapman v. Murch*, 19 John. 290.) It is sufficient to prove words of equivalent import. And I think that has been done in this case.

The only other objection to the relief sought, which I deem it necessary to notice, is the lapse of time which had occurred before any measures were taken to avoid the contract. It is true, that where, between the time of making the contract and applying to rescind it, great changes have taken place in the character and value of the property, the lapse of time is an important consideration. But here no material change in the property occurred after the contract. There is nothing to prevent the purchaser from restoring it in as good condition as he received it. He offered to rescind the contract within a reasonable time after he had ascertained, by actual experiment, that the representations which had induced him to purchase were

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not verified. No injustice to the vendor will result from the delay of the purchaser in filing his bill. Under such circumstances, the lapse of time furnishes no well grounded objection to the relief sought.

My opinion, therefore, is that the sale should be set aside, and that the parties should be restored to their original rights.

There must be a decree, directing the repayment of the purchase money received by Fleet, with interest, upon the execution of a re-conveyance by Taylor, sufficient to re-vest the title in Fleet. Taylor is also entitled to be paid for the increased value of the farm by reason of permanent improvements made since the purchase; and must be charged with the fair annual value of the use of the farm since the sale. There must be a reference to Samuel M. Woodruff, Esquire, or such other suitable person as may be agreed upon by the parties, to ascertain the amount due from Fleet upon these principles. Such amount is to be declared to be an equitable lien upon the premises, and if, within thirty days after the coming in and confirmation of the report, the amount due shall not be paid, application may be made at the foot of the decree, for a sale of the farm, to pay such amount with interest and costs. The bond and mortgage executed to secure the balance of the purchase money, and for the foreclosure of which the cross-bill is filed, must be cancelled. Taylor is also entitled to costs of the original and cross-suits.

SAME TERM. *Before the same Justice.*

THE PEOPLE, ex rel. Nieury, *vs.* THE JUSTICES OF THE
SUPERIOR COURT OF THE CITY OF NEW-YORK.

Under the section of the revised statutes directing that where a defendant has appeared by putting in and perfecting bail, the plaintiff shall declare against him before the end of the next term, or that judgment of discontinuance *may* be entered according to the course and practice of the court, the whole matter is left to be determined by the discretion of the court, and according to its course and practice.

It was the intention of the legislature to vest in the court the power, in cases where the defendant is not in prison, to exercise its discretion in directing a judgment of discontinuance, or not. Courts, therefore, have the right to adopt the practice of enlarging the time, in such cases, for the plaintiff to declare, beyond the end of the next term after the return of the writ, upon proper cause shown therefor.

Aliter, where a defendant is committed to prison for want of bail.

THE relator was arrested upon a capias issued out of the superior court of the city of New-York, in an action of trover, at the suit of Brian O'Hara. The writ was returnable on the first Monday of July, 1847. The defendant in the writ appeared by putting in and perfecting special bail. At the August term of the court the plaintiff in the writ, upon notice to the defendant, applied for and obtained a rule enlarging the time to declare, to the first of December. At the November special term of this court the relator obtained an alternative mandamus directing the superior court to enter *judgment of discontinuance* against the plaintiff, in the action, or shew cause at the next special term.

To this writ the justices of the superior court returned that it is the course and practice of that court, in such cases, to enlarge the time for the plaintiff to declare beyond the end of the next term after the return of the writ, upon proper cause shown therefor; and that the time for the plaintiff to declare had been extended in conformity with such practice. The relator now moved for a peremptory mandamus.

A. D. Logan, for the relator.

Theodore Sedgwick, for the defendants.

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HARRIS, J. The revised statutes, (2 R. S. 350, § 23,) provide that when a defendant is committed to prison for want of bail, the plaintiff shall declare against him before the end of the next term after that at which the process upon which he was committed was returnable, or "the defendant shall be discharged from his imprisonment, and shall be entitled to judgment of discontinuance against the plaintiff." This provision is imperative—nothing is left to the discretion of the court—nothing depends upon the practice of the court. The legislature have said what shall be done in the case; and the court has nothing to do but carry into effect the direction of the legislature.

But while by the 24th section of the same act the plaintiff is required, in terms equally positive, to declare against a defendant, who has appeared by putting in and perfecting bail, before the end of the next term, there is this remarkable difference in the consequence of a failure to declare within the time provided. In the former case, the defendant *shall* be discharged and shall have judgment of discontinuance; but in the latter case, it is only provided that "*judgment of discontinuance MAY be entered according to the course and practice of the court.*" It would not be easy to present an example which would more clearly illustrate the distinction between a statute which *permits* a thing to be done, and one which *requires* a thing to be done.

In the former case, the statute is compulsory—in the latter the whole matter is left to be determined by the discretion of the court, and according to its course and practice. There can be no doubt that the legislature intended to vest in the court the power, in cases where the defendant is not in prison, to exercise the discretion which the superior court has in this instance assumed.

It becomes unnecessary therefore, to examine the question which was principally discussed upon the argument of this motion, whether this court has the power to award a mandamus in such a case. The motion must be denied with costs.

SAME TERM. *Before the same Justice.*

DAVISON vs. SCHERMERHORN and MARCH.

A plea in equity is a special answer, setting forth and relying upon some one fact, or several facts, tending to one point, sufficient to bar the suit. Its office is to reduce so much of the cause as it professes to answer, to a single point.

Where a bill, in order to avoid the effect of a plea of the statute of limitations, alleges a promise within six years, the defendant must deny such promise by averment in his plea, and put in an answer, in support of the plea, containing a like denial.

But where the bill does not state a new promise within six years, the plea should not contain a denial of such a promise. If it does so, however, the plea, though informal, will not be objectionable for duplicity. The denial of a new promise is not a new matter of defence, but is intended to aid the defence of the statute of limitations; and it may be treated as surplusage.

A defendant putting in a plea to a bill in equity must, in such plea, express distinctly to what part of the bill he intends to plead. The parts of the bill to which the plea is intended to apply should be so clearly defined as that the court, on looking at the bill, can determine what parts are covered by the plea, and what are not.

IN EQUITY. The bill in this cause stated that on the 14th of July, 1834, a copartnership was entered into between the plaintiff and the defendants and one Donald C. Stevenson, since deceased, which was dissolved in July, 1835. It charges that upon a settlement of the partnership accounts between the parties a considerable balance would be found due from the defendants to the plaintiff; and then proceeded as follows: "But nevertheless the said defendants are proceeding now, and have been since the aforesaid dissolution, to collect all the copartnership debts due to the said firm; which they are enabled to do by means of the said books, and to apply the same to their own use." The bill prayed for an account of the partnership transactions. It was filed on the 13th of January, 1846.

The defendants put in a plea of the statute of limitations to the whole bill, "except such parts of the said bill as seek a discovery whether the defendants are not now, and have not been since the dissolution of the said copartnership, proceeding to collect all their partnership debts due to the said firm." The plea, after alleging that the plaintiff's cause of action accrued above six years before the filing of the bill or suing out process,

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proceeded as follows: "And these defendants for further plea say, that these defendants did not, at any time within six years before exhibiting the said bill, or serving or suing out process against these defendants to appear to and answer the same, promise or agree to come to any account for, or to pay or in any way to satisfy the said complainants, any sum or sums of money for or by reason of any matters, transactions, or things in the said bill of complaint charged or alleged." The plea was accompanied by an answer, denying that the defendants were proceeding to collect, or that they have at any time since the dissolution of the copartnership, and within six years before the filing of the bill or the serving or suing out process to appear and answer the bill, collected or received, or applied to their own use, any of the copartnership debts. The plea having been set down for argument by the plaintiff, the question upon the present hearing was as to the sufficiency thereof.

J. L. White, for the plaintiff.

W. C. Noyes, for the defendants.

HARRIS, J. It was not denied by the counsel for the plaintiff that the statute of limitations, if properly pleaded, would constitute a full defence to the suit. The objections to the plea relate entirely to its form.

The first objection upon which the plaintiff's counsel relies is that the plea is double. A plea is properly defined to be a special answer, setting forth and relying upon some one fact or several facts, tending to one point, sufficient to bar the suit. Its office is to reduce so much of the cause as it professes to answer to a single point. The allegation in this plea that the plaintiff's cause of action did not accrue or arise within six years before the commencement of the suit, is a complete defence to so much of the bill as the plea professes to cover. Upon the argument I was strongly inclined to agree with the counsel for the plaintiff, that the further allegation in the plea that the defendants had not within six years made any promises, to take the case out of the statute of limitations, rendered the plea

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multifarious. This averment was certainly unnecessary. It adds nothing to the force or validity of the plea. If the plea is not good without it, it is bad with it. If the bill, in order to avoid the effect of a plea of the statute of limitations, had alleged a promise within six years, then it would have been necessary to deny such promise by averment in the plea, and to accompany the plea with an answer in support of the plea containing a like denial of the promise. (*Story's Eq. Pl.* § 754.) But in this case the bill does not state a new promise within six years, and the plea therefore should not have contained a denial of such promise. In this respect the plea is clearly informal; but I do not think it objectionable for duplicity. The plea contains but a single point of defence—the statute of limitations. The denial of a new promise is not a new matter of defence, but it is intended to aid the defence of the statute of limitations. Though unnecessary and informal, it is not for that reason multifarious; but is rather, I think, to be treated as *surplusage*. Mr. Chitty describes surplusage to be a statement beyond what is necessary to constitute a cause of complaint or ground of defence. The case before us is within this definition. And it is laid down as a rule by *Beames*, in his treatise on *Pleas in Equity*, p. 20, that an allegation of mere surplusage will not prejudice a plea in equity by rendering it multifarious or double.

It is also insisted that the plea covers too much. The rule on this subject is very distinctly stated by *Story*, (*Eq. Pl.* § 674,) as follows: "When the plaintiff charges some circumstances which may be true, and to which there may be a valid ground of plea, and also charges other circumstances which are inconsistent with the substantial validity of the plea, the defendant must distinguish those facts which if true would not invalidate or disprove his plea, and plead to the discovery sought with regard to them. And he must then accompany the plea with an answer to the facts, and to those only, which if true would disprove or invalidate his plea, and to all the matters which are specially alleged as evidence of those facts." Applying this rule to the case before us, the question is, whether the bill charges any circumstances which are inconsistent with the substantial

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validity of the plea of the statute of limitations, and then, if it does, whether the answer which accompanies the plea covers those circumstances. If it does not, the plea is bad for this reason. The plea and answer would not meet the whole equity of the bill. The answer which accompanies the plea is confined to transactions in relation to the business of the partnership within six years preceeding the commencement of the suit. It is said that the bill charges the defendants with fraud in relation to the partnership affairs, and that the plaintiff was entitled to a discovery with respect to such fraud. It would undoubtedly be true, if the bill contained a distinct allegation of fraud, and that such fraud had been discovered within six years before the filing of the bill, that the plaintiff would have been entitled to an answer as to such allegations; for if admitted, they would invalidate the plea of the statute of limitations. But no such allegation is contained in the bill. There is no fraud charged in the bill, which, if admitted as charged, would in any way disprove the defendant's plea; and therefore, according to the rule already stated, no answer was required. For the same reason the defendants were not bound to answer as to the existence of the partnership, or in relation to the co-partnership books. No answer that could be given in this respect could be available to the plaintiff to defeat or invalidate the defence of the statute of limitations.

The only other objection to the sufficiency of the plea, taken by the plaintiff's counsel is that it is not sufficiently explicit in stating to what part of the bill it is intended to apply. It is true that the defendant must in his plea express distinctly to what part of the bill he intends to plead. The criterion seems to be that the parts of the bill to which the plea is intended to apply should be so clearly defined as that the court can, on looking at the bill, determine what parts are covered by the plea and what are not. In this case the plea professes to extend to the whole bill, with an exception which is clearly and definitively expressed. There is no need of looking beyond the bill to ascertain what the plea covers. The plea is therefore sufficient in this respect also, and must be allowed.

SAME TERM. *Before the same Justice.*

NIEURY vs. O'HARA.

To maintain a bill of discovery in aid of a defence at law, the plaintiff must state a case which, if established, would constitute a good defence at law; and he must then state some fact, material to such defence, which he wishes to establish by the confession of the defendant.

The refusal of a court of law to allow a defendant a further bill of particulars of the plaintiff's demand, will not authorize such defendant to file a bill of discovery in a court of equity, as to the grounds of the suit at law; where the bill shows no right to any discovery, and sets forth no matter material to the defence at law.

A mere fishing bill, the sole object of which is to ascertain the grounds upon which the defendant has thought fit to commence an action at law against the plaintiff, will not be sustained.

IN EQUITY. This was a motion to dissolve an injunction staying proceedings in an action at law, granted upon filing a bill of discovery. The defendant had commenced against the plaintiff two suits in the New-York superior court; one in trover, the other in assumpsit. The declaration in the former action showed that the plaintiff's claim in that suit was for the conversion of three pagaris, or promissory notes, made in the island of Porto Rico, amounting to about \$7000. In the latter action, the declaration contained merely the common money counts; and in a bill of particulars furnished in that suit, the plaintiff claimed to recover, under the common counts, \$7000 for money had and received by the defendant, for the use of the plaintiff, and the like sum for money lent by the plaintiff to the defendant. An application by the defendant to the superior court for a further bill of particulars was denied. The defendant then filed his bill of discovery, in which, after stating these facts, he alleged that, while he supposed both suits to have been brought for the same cause of action, he had no *legal certainty* of the fact, and was thereby prevented, Firstly, from pleading the pending of the action of trover as a defence to the action of assumpsit; Secondly, from moving to compel the plaintiff to elect to discontinue one or the other of his ac-

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tions ; and Thirdly, from properly preparing himself to disprove the claim, if in truth it is for some other cause of action than that stated in the first declaration. And he therefore prayed for a discovery of the real and true particulars of the plaintiff's claim and demand against him in the action of assumpsit.

Theodore Sedgwick, for the defendant.

A. D. Logan, for the plaintiff.

HARRIS, J. The substance of the plaintiff's bill is that he has been sued by the defendant in an action of assumpsit ; that although he has diligently invoked the aid of the court in which the suit is brought, he has been unable to ascertain for what he has been sued, and therefore, that he may know beforehand, he asks a discovery of the plaintiff's real cause of action. In other words, he asks this court to furnish him with the means of obtaining from the defendant, what the superior court refused to allow him, a further bill of the particulars of the plaintiff's demand. It is not easy to see why the court, in which the action is pending, refused such further bill ; but such refusal can form no ground for the interference of this court. The bill shows no right to any discovery. It sets forth no matter material to a defence at law, but merely seeks a discovery of the grounds of the suit at law. It is a well settled rule that to maintain a bill of discovery in aid of a defence at law, the plaintiff in the bill must state a case, which if established, would constitute a good defence at law ; and then state some fact material to such defence, which he wishes to establish by the confession of the defendant. (*Story's Eq. Pl.* §§ 319, 325. *Newkirk v. Willett*, 2 *Caines' Ca. in Er.* 296. *Williams v. Harden*, 1 *Barb. Ch. Rep.* 298.)

But I do not understand the plaintiff as insisting upon a discovery of any particular state of facts, which may be used in establishing a defence to the action at law. On the contrary, he asks for a discovery of "the real and true particulars of the

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plaintiff's claim or demand," so that if it shall appear upon obtaining such discovery, that both suits are in fact brought for the same cause of action, he may avail himself of that fact, either by a plea or a motion to compel the defendant to elect which of the actions he will prosecute. Or, if it shall appear that the two suits are brought upon different causes of action, that then he may prepare himself to disprove the claim made against him. In short, it is a mere fishing bill, the sole object of which is to ascertain the grounds upon which the defendant has thought fit to commence an action at law. To sustain such a bill, would be going greatly beyond the limits within which courts of equity have confined themselves, in granting a discovery to aid the prosecution or defence of an action at law. The motion to dissolve the injunction must, therefore, be granted with costs.(a.)

(a) See *Deas v. Harvie*, (2 Barb. Ch. Rep. 448.)

SAME TERM. *Before the same Justice.*

THE MARINE AND FIRE INSURANCE BANK OF GEORGIA vs.
JAUNCEY and WOOD.

Where a draft was drawn by a consignor of cotton, upon the consignee thereof, on account of such consignment, and was discounted by a bank, upon the faith of representations made by the payee and the drawer that such draft was drawn against the consignment, and would be paid out of the proceeds thereof; which draft was accepted by the drawee, but before the cotton was received by him, he executed a general assignment of his property, for the benefit of his creditors, and his assignee claimed the cotton as a part of the assigned estate; *Held* that the proceeds of the cotton, in the hands of such assignee, was a trust fund, applicable to the payment of the draft drawn against such proceeds.

An assignee claiming under a general assignment made by a failing debtor, for the benefit of creditors, is only entitled to the same rights and equities which the debtor would have possessed.

Where a principal debtor provides, in the hands of his surety, or of one standing in

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the situation of a surety, a fund to pay his debt, the creditor is entitled to have such fund applied in payment of that debt. And this even where the creditor had no knowledge of the existence of the fund, when he became such creditor.

Where a foreign corporation appears in court, it must establish its right to bring the suit, and to make the contract it seeks to enforce. But it is sufficient if this is shown upon the hearing of the cause. It is not necessary to set forth, in the pleadings, the authority upon which it relies to sustain its right to sue or enforce the contract.

IN EQUITY. The bill in this cause stated, that in June, 1846, John Wood, then residing in Savannah, shipped and consigned to Joseph Wood, a commission merchant in New-York, 105 bales of cotton, for sale on commission, on his account; that the cotton was received in New-York on the 12th day of July; that on the 29th day of June, John Wood made his draft upon Joseph Wood, at 60 days sight, for \$3000, payable to the order of Thomas T. Walsh; that the draft was drawn against the proceeds of the cotton, to be realized on a sale in New-York; that the draft was presented to the plaintiffs by the payee, for discount, on the day it was drawn; that Walsh and John Wood then represented that the draft had been drawn against the consignment of the cotton, and would be paid out of its proceeds. And upon the faith of such representation the plaintiffs discounted the draft; that it was accepted on the 6th of July, and when it became due, it was protested for non-payment; that before the cotton arrived at New-York, and on the 30th of June, Joseph Wood executed to the defendant Jauncey, a general assignment for the benefit of his creditors; that when the cotton arrived at New-York, Jauncey, by virtue of his assignment, took possession of it as a part of the assigned estate, and refused to account for it to the plaintiffs. That on the 30th of September, the plaintiffs gave notice to Jauncey of their claim upon the proceeds of the cotton, for the payment of the draft—and that he then had the cotton or its proceeds in his possession; that John Wood and Joseph Wood are both insolvent. The bill prayed that the proceeds of the cotton might be applied by Jauncey to the payment of the draft.

Jauncey and Joseph Wood demurred to the bill for want of equity. Also because Walsh was not made a party, and for the

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further reason that the plaintiffs were a foreign corporation, and that it does not appear in the bill that they had authority by law to make discounts.

G. N. Titus, for the plaintiffs.

H. H. Stuart, for the defendants.

HARRIS, J. At the time of the execution of the assignment, Joseph Wood had no interest in the cotton which could be conveyed by the assignment. The cotton had not arrived. The draft had not been accepted. When he accepted the draft he acquired a lien upon the cotton for his indemnity, but this could give Jauncey no right to claim the cotton. He then stood in the situation of a surety for John Wood, the principal debtor. The proceeds of the cotton, if received by him, would have constituted, in his hands, a trust fund applicable to the payment of the draft. It is not denied, that as between him and John Wood, the party providing the fund for a specific object, such application could have been enforced. It cannot be pretended that Jauncey acquired any greater interest, or better right to the cotton, than Joseph Wood would have had if no assignment had been made, or than he would have acquired if the draft had been accepted before the assignment. It is well settled that an assignee claiming under a general assignment made by a failing debtor, for the benefit of creditors, is only entitled to the same rights and equities as the debtor himself would have possessed. It seems to follow then that the proceeds of this cotton in the hands of Joseph Wood's assignee became a trust fund applicable to the payment of the draft drawn against such proceeds.

Again; it is well settled that where a principal debtor provides, in the hands of his surety, or one standing in the situation of a surety, a fund to pay his debts, the creditor is entitled to have such fund applied in payment of that debt. (*Curtis v. Tyler*, 9 *Paige*, 434. *Pratt v. Adams*, 7 *Id.* 626.) And this too, even where the creditor had no knowledge of the exist-

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ence of the fund when he became such creditor. In this case, then, the plaintiffs having, by the discount of the draft, become the creditors of John Wood, the principal debtor, they are entitled, as the holders of the draft, to the benefit of any fund provided by John Wood for its payment; whether in discounting the draft they relied upon the credit of the fund or not. Jauncey having taken the place of Joseph Wood, so far as the fund is concerned, is bound to apply it to the purpose for which it was provided.

Nor can I think the other grounds of demurrer well taken. It does not appear that Walsh had been charged as endorser of the draft; and if he had not been, he had no possible interest in the subject matter of the suit. But even if he were liable as endorser, I cannot see that he would have been a necessary or even a proper party to the suit. As endorser he might have an equitable claim to have the property provided by the drawer of the draft applied to its payment. If he has any interest at all, it is identical with that of the plaintiffs. If he had been made a party, no decree could properly have been made against him.

It is undoubtedly true, that when a foreign corporation appears in court, it must establish its right to bring the suit and to make the contract it seeks to enforce. But I understand that it is sufficient to show this upon the hearing of the cause, and that it is not necessary to set forth in the pleadings, the authority upon which it relies to sustain its right to sue or enforce the contract. (*Bank of Michigan v. Williams*, 5 Wend. 478.)

The demurrer must be overruled with costs. The defendants may have thirty days to pay the costs, and put in their answer. In case they do not elect to answer within that time, the bill is to be taken as confessed by them.

SAME TERM. *Before the same Justice.*

BATTERSON vs. FERGUSON.

The averments, in a creditor's bill, that the defendant has property, &c. to the amount of \$100, and that the bill is not filed by collusion, being required by a rule of the court to be inserted in bills of that nature, the bill would be defective in form without them. But they constitute no part of the plaintiff's case, and it is not necessary for him to prove them. Consequently, the defendant is not bound to answer those averments.

The rule for determining whether an answer to any particular averment in the bill is necessary, is to ascertain whether it is material to the plaintiff, to enable him to obtain the relief he seeks, to have the proof, or admission, of such averment. If the proof will avail the plaintiff, in obtaining relief, he is entitled to an answer: otherwise the defendant is not bound to answer; for his answer would be immaterial.

Where the bill stated that the defendant had a *considerable* amount of money, or of debts, &c. due to him, and the defendant, in his answer, denied that he had *considerable* money, &c. due to him; but he annexed to his answer a schedule of his property and effects, and stated that it contained a true and full account of all his estate, of every description, goods, chattels, debts and other choses in action; *Held*, that although that part of the answer, taken by itself, might be deemed uncertain and evasive, it was sufficient in connection with the schedule and the averments in the answer respecting such schedule.

An allegation, in a bill, that the defendant has debts, &c. due to him from different persons whose names are unknown to the plaintiff, is immaterial, so far as relates to the plaintiff's ignorance of the names of the debtors; and the defendant need not answer it.

Where the bill charged that, at the time of the commencement of the suit, the defendant had *some* interest in *some* real estate, &c., and the defendant, in his answer, denied that he had *some* interest in *some* real estate; *Held*, that although the denial was defective in form, the defendant had substantially met the charge.

The fact that property held by a defendant in right of his wife has been delivered over to a receiver appointed in another suit, does not excuse the defendant from giving the best account of such property which he is able to give.

Where the bill states that the defendant has lately recovered a judgment against another person, which belongs to him, it is not sufficient for the defendant to say, in his answer, that all his interest, such as he had, in the verdict, was disposed of and assigned to a third person. The plaintiff has a right to know what the defendant's interest in the verdict was, and when it was assigned, and the particulars in relation to the disposition of his interest.

IN EQUITY. Exceptions to the defendant's answer, for insufficiency. The bill was an ordinary creditor's bill, stating the recovery of a judgment in the New-York common pleas for

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\$161.07, the issuing and return of an execution, unsatisfied, and it then stated, in conformity with the requirements of the 131st rule, that the plaintiff had reason to believe that the defendant had equitable interests, things in action or other property of the value of one hundred dollars or more, &c. The bill also stated that the defendant had a *considerable* amount of money or of legal or equitable debts, &c. due from different persons whose names were unknown to the plaintiff; or that he had money or other personal property, &c. the situation, value and particulars of which were unknown to the plaintiff. It charged that *at the time of the rendition of the judgment* the defendant "possessed, owned, or had, or *now possesses, owns, or has some interest in some real estate,*" &c.—and prayed a full disclosure in the premises. It also stated that the defendant had lately recovered a judgment against the Berean Church which then belonged to the defendant. The grounds of the exceptions appear sufficiently in the opinion of the court.

W. S. Rowland, for the plaintiff.

E. J. Porter, for the defendant.

HARRIS, J. The first exception is founded upon the statement of the bill that the plaintiff has reason to believe, and does believe, that the defendant has equitable interests, things in action or other property of the value of one hundred dollars, &c. In answer to this allegation, the defendant has merely denied that he has equitable interests, &c. of the value of one hundred dollars. The plaintiff insists that in answering this allegation the defendant was bound to state whether he was possessed of any property; leaving it to the court to judge of its value. But I do not understand that the defendant in a creditor's bill is bound to answer the averments that the defendant has property, &c. to the amount of one hundred dollars, or that the bill is not filed by collusion, at all. These averments are required, by a rule of the court, to be inserted in the bill, and of course it would be defective in form without them. They con-

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stitute, however, no part of the plaintiff's case. It is not necessary for him to prove them, to entitle him to the relief sought. The rule for determining whether an answer to any particular averment is necessary is to ascertain whether it is material to the plaintiff, to enable him to obtain the relief he seeks, to have the proof, or admission of such averment. If the proof will avail the plaintiff in obtaining relief, he is entitled to an answer; otherwise the defendant is not bound to answer, for his answer would be immaterial. The first exception is therefore disallowed.

The defendant has annexed to his answer a schedule of property and effects, and states that it contains, according to the best of his knowledge and remembrance, as well as his understanding, information, hearsay, and belief, a true and full statement of all his estate real and personal, whether in his own right, or in right of his wife, of every description, goods, chattels, money, stock, book accounts, due bills, promissory notes, bonds, mortgages, judgments and other choses in action, and each of them, belonging to the defendant, or in which he had any interest, or in which, at the time of the commencement of the suit in which the judgment was recovered, and from thence until the time of filing the plaintiff's bill, whether standing in his name, or in the name or in the hands of any other person or persons, for his use or in trust for him, either express or implied, and what disposition has been made of each of the same, &c.

The second exception is founded upon the statement of the bill, that the defendant has a *considerable* amount of money or of legal or equitable debts, &c. due to him. The answer, in addition to the statements already referred to, denies that the defendant had *considerable* money, &c. due to him. This part of the answer, taken by itself, might be deemed uncertain and evasive. The answer is certainly inartificially drawn, but I think the part of the answer to which I have already referred, sufficiently answers the matter of this exception. It must therefore be disallowed.

For the same reason the third exception is also disallowed. This exception is founded on the allegation that the defendant

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has debts, &c. to a considerable amount due to him from different persons whose names are unknown to the plaintiff. The defendant has denied that he has debts due to him from persons whose names are unknown to the plaintiff. Whether or not the names of the defendant's debtors were known to the plaintiff, is immaterial. The only part of the allegation which it was necessary for the defendant to answer, was the charge that he had debts due to him, and this, as I have already stated, is sufficiently answered in another part of the answer.

The fourth exception must also be disallowed. The defendant has unnecessarily denied that he has money, &c. the situation, value and particulars of which are unknown to the plaintiff. Another part of the answer already mentioned is deemed to give a sufficient account of the defendant's property in this respect, and therefore the whole of that part of the answer to which this exception relates, might properly have been omitted.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth exceptions, all depend upon the same question. The bill charges that at the time of the commencement of the suit, the defendant had *some* interest in *some* real estate, &c. The defendant denies that he had *some* interest in *some* real estate. This denial, it is contended, is not a sufficient answer to the charge. To meet the affirmative charge in the bill, it is insisted that the defendant should have denied that he had *any* interest in *any* real estate. The form of expression adopted by the defendant in denying literally the charge of the plaintiff is certainly inelegant, and perhaps not grammatically correct. But I think it would be too rigid a criticism, to hold that the defendant had not in this instance, by following the language of the affirmative charge in the bill, in his negative reply, substantially met the charge. I think he could be convicted of perjury upon this statement, if it should be proved that he had *any* interest in *any* real estate. Besides, he has given a sufficient account of all the matters embraced in these exceptions in another part of the answer. All these exceptions are therefore disallowed.

The fourteenth exception is also disallowed for the same reasons

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stitute, however, no part of the plaintiff's case. It is not necessary for him to prove them, to entitle him to the relief sought. The rule for determining whether an answer to any particular averment is necessary is to ascertain whether it is material to the plaintiff, to enable him to obtain the relief he seeks, to have the proof, or admission of such averment. If the proof will avail the plaintiff in obtaining relief, he is entitled to an answer; otherwise the defendant is not bound to answer, for his answer would be immaterial. The first exception is therefore disallowed.

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The second exception is founded upon the statement of the bill, that the defendant has a *considerable* amount of money or of legal or equitable debts, &c. due to him. The answer, in addition to the statements already referred to, denies that the defendant had *considerable* money, &c. due to him. This part of the answer, taken by itself, might be deemed uncertain and evasive. The answer is certainly inartificially drawn, but I think the part of the answer to which I have already referred, sufficiently answers the matter of this exception. It must therefore be disallowed.

For the same reason the third exception is also disallowed. This exception is founded on the allegation that the defendant

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has debts, &c. to a considerable amount due to him from different persons whose names are unknown to the plaintiff. The defendant has denied that he has debts due to him from persons whose names are unknown to the plaintiff. Whether or not the names of the defendant's debtors were known to the plaintiff, is immaterial. The only part of the allegation which it was necessary for the defendant to answer, was the charge that he had debts due to him, and this, as I have already stated, is sufficiently answered in another part of the answer.

The fourth exception must also be disallowed. The defendant has unnecessarily denied that he has money, &c. the situation, value and particulars of which are unknown to the plaintiff. Another part of the answer already mentioned is deemed to give a sufficient account of the defendant's property in this respect, and therefore the whole of that part of the answer to which this exception relates, might properly have been omitted.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fifteenth exceptions, all depend upon the same question. The bill charges that at the time of the commencement of the suit, the defendant had *some* interest in *some* real estate, &c. The defendant denies that he had *some* interest in *some* real estate. This denial, it is contended, is not a sufficient answer to the charge. To meet the affirmative charge in the bill, it is insisted that the defendant should have denied that he had *any* interest in *any* real estate. The form of expression adopted by the defendant in denying literally the charge of the plaintiff is certainly inelegant, and perhaps not grammatically correct. But I think it would be too rigid a criticism, to hold that the defendant had not in this instance, by following the language of the affirmative charge in the bill, in his negative reply, substantially met the charge. I think he could be convicted of perjury upon this statement, if it should be proved that he had *any* interest in *any* real estate. Besides, he has given a sufficient account of all the matters embraced in these exceptions in another part of the answer. All these exceptions are therefore disallowed.

The fourteenth exception is also disallowed for the same reasons

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which have been stated in reference to the fourth. I think the sixteenth and seventeenth are well taken. The fact that the personal property and real estate held by the defendant in right of his wife, had been delivered over to a receiver appointed in the suit between the defendant and his wife, does not excuse the defendant from giving the best account of such property and estate which he is able to give. The statements in the schedule forming a part of the answer in relation to this property, are not sufficiently explicit. These exceptions are, therefore, allowed—but the eighteenth exception which relates to the same matter, must be disallowed. The answer states that the property was all duly delivered over to the receiver by the defendant “long previous to the rendition of the plaintiff’s judgment.” I do not think the defendant was bound to specify, more particularly *when* the delivery was made.

The nineteenth, twentieth, and twenty-first exceptions must be allowed. The defendant merely states that all his interest, such as he had, in the verdict recovered by him against the Berean Church, was disposed of and assigned to one James Dodds. The plaintiff had a right to know what his interest in that verdict was, and when it was assigned, and the particulars in relation to the disposition of his interest.

The twenty-second exception is also well taken. The defendant is required, by an interrogatory in the bill, to state which of the debts due him are good and collectible, and which doubtful and bad. The answer admits a debt due from Deck, but omits to state the character of the debt.

The twenty-third, twenty-fourth, and twenty-fifth exceptions are also allowed. The defendant has admitted that due bills to the amount of \$200 were either in the hands of the receiver, or his wife, counsel, or some other person unknown to the defendant, but has omitted to state the names or places of residence of the persons against whom the due bills are held, and the amount of such due bills respectively, and the character thereof. For the same reasons the twenty-sixth and twenty-seventh exceptions are also allowed. The plaintiff is entitled to the costs of the exceptions allowed, and the defendant having

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succeeded upon a majority of the exceptions, is also entitled to costs. The usual order for a further answer must be entered, and the costs to which the defendant is entitled may be set off against the plaintiff's costs.

SARATOGA SPECIAL TERM, September, 1847.

Paige, Justice.

SWARTWOUT vs. BURR.

Where a party makes a contract for the sale of land, and dies before the performance of the contract, leaving an only child as his heir at law, who is a lunatic, a court of equity has power to decree a specific performance of the contract, and to direct the committee of the lunatic to execute all necessary conveyances, for the purpose.

Costs of a suit, to compel the specific performance of a contract, cannot be allowed to the plaintiff, where no application has been made by him to the defendant, previous to the filing of the bill, to carry the contract into effect, and there has been no refusal or neglect on the part of the latter, to execute the contract; and where the defendant has not been guilty of any improper conduct, and has not improperly resisted the plaintiff's claim to a specific performance.

Where a bill for a specific performance of a contract, is filed against the heir of the party who made the contract, and such heir is a lunatic, neither the lunatic, nor his estate, can be charged with the costs of the suit.

Where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee, of the real estate, and the vendee a trustee for the vendor, of the purchase money. The vendee is treated as owner of the land, and it is devisable and descendible as his real estate. The money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him, as other personalty, and is distributable in the same manner, on his death.

The trust in the vendor, for the vendee in such a case, attaches to the land, and binds the heirs of the former.

And if the vendor dies, before the execution of the contract, by the conveyance of the land and the payment of the purchase money, the purchase money must be paid to the personal representatives of the vendor.

IN EQUITY. The bill in this case was filed to compel a specific performance of a parcel agreement, made by Jonathan

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Burr, deceased, with the plaintiff, for the conveyance, by Burr, to the plaintiff, of a parcel of land in Wilton, Saratoga county. The bill alleged that Jonathan Burr held a mortgage against the plaintiff, on the premises, which were owned by the plaintiff, for eight hundred dollars; and that Burr, on the 29th of August, 1843, commenced proceedings, under the statute, to foreclose the same; and that previous to the sale of the premises, Burr entered into a verbal agreement, with the plaintiff, by which Burr agreed that he would, after the sale under the statute foreclosure, convey the premises to the plaintiff; and, by such agreement, in consideration thereof, the plaintiff agreed to pay the costs of the foreclosure, in cash; and to give a bond and mortgage to Burr, for the principal and interest due on the mortgage then being foreclosed, payable at such time or times, as should be fixed by Burr, with interest to be paid annually; and that by such agreement, the plaintiff was to continue in, and retain the use and possession of the premises. That, on the 2d day of December, 1843, the premises were sold at public auction, by virtue of such statute foreclosure, and the same were bid in by Burr, for one hundred dollars. The bill also alleged, that the plaintiff, in pursuance of such agreement, on the 8th of January, 1844, paid the costs of the foreclosure, in cash; that the plaintiff, shortly after the payment of such costs, requested Burr to convey the premises to him, on receiving the bond and mortgage mentioned in the verbal agreement; that Burr, when such request was made, told the plaintiff, that he would execute a conveyance in pursuance of such agreement, but could not then do it, on account of his ill health; and that Burr then promised to inform the plaintiff, when he should be ready to carry into effect the agreement; but that he never informed the plaintiff that he was ready to execute the agreement; and that Burr died, in November, 1844, without having performed such agreement. The bill also alleged, that the plaintiff, ever since the sale under such statute foreclosure, has retained and continued in the possession of the premises; and that no rent was ever demanded, for the occupation thereof, by Burr. That Burr left him surviving Charles Burr, his only

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child and heir at law ; that said Charles Burr was, by a decree of the court of chancery, on the 9th of December, 1844, declared a lunatic ; and that John Cramer was appointed the committee of his estate. The lunatic, Charles Burr, by his committee, put in an answer, alleging ignorance of the verbal agreement set forth in the plaintiff's bill, denying the material facts mentioned therein, and submitting the rights of the lunatic to the protection of the court. The proofs taken in the cause established the making of the agreement set forth in the bill, and all the other material facts alleged therein ; except the allegations, that the plaintiff requested Jonathan Burr to convey the premises to him, in pursuance of the agreement, and that Burr declined, at the time, to execute such conveyance, and that he never afterwards informed the plaintiff that he was ready to execute the same to him. It was proved that the plaintiff had, since the mortgage sale, made improvements on the premises, to a considerable extent. The personal representatives of Jonathan Burr were not made parties to the bill.

E. F. Bullard, for the plaintiff.

Charles Cramer, for the defendants.

PAIGE, J. The facts of this case take the parol contract, set forth in the plaintiff's bill, out of the statute of frauds, and entitle the plaintiff to a decree for a specific performance of such contract. There is clear and satisfactory proof of the contract for the conveyance of the premises in question, by Jonathan Burr to the plaintiff ; and the part performance of the contract is sufficient to take it out of the statute. A part of the consideration money was paid, possession was taken, and valuable improvements made, under the contract. (*Parkhurst v. Van Cortland*, 14 John. 15. 2 *Caines' Cas. in Err.* 87. 1 John. Ch. 131. 2 *Id.* 273.)

The court is authorized to decree, that the committee of Charles Burr execute and deliver to the plaintiff, a conveyance

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of the premises in question, in pursuance of the parol contract set forth in the bill of complaint. (2 R. S. 55, §§ 19, 20, 22. *Id.* 194, § 169.)

The principal question in the case is, whether the plaintiff is entitled to a decree for costs, to be paid out of the estate of Charles Burr, the lunatic. If the allegations in the bill, that the plaintiff had applied to Jonathan Burr, during his life, for a conveyance of the premises, in pursuance of the agreement, on his receiving the bond and mortgage which the plaintiff was required to give, on the delivery of the deed to him by Burr, and that Burr declined, when so applied to, to convey the premises to the plaintiff, had been proved, I should have had no hesitation in allowing the plaintiff the costs of this suit. Costs of a suit to compel a specific performance of a contract, cannot be allowed to the plaintiff, where there has been no application by him to the defendant, previous to the filing of the bill, to carry the contract into effect, and no refusal or neglect on the part of the latter to execute the contract; and where the defendant has not been guilty of any improper conduct, and has not improperly resisted the plaintiff's claim to a specific performance. In *Dyer v. Potter*, (2 John. Ch. 152,) where a bill was filed against the heirs and trustees of the vendor, for a specific performance of a contract to convey land, there having been no improper behavior on the part of the defendants, and they having interposed no unjustifiable defence, a specific performance was decreed; but the defendants were not charged with the costs of the suit. In *Keisselbrack v. Livingston*, (4 John. Ch. 144,) a specific performance was decreed, with costs against the defendant; but there, the defendant had refused to execute the agreement, previous to the filing of the bill. (*Hanson v. Lake*, 2 Younge & Coll. Ch. Cas. 328.)

As a general rule, a party coming into court to redeem mortgaged premises, pays costs to the defendant, although he obtains the relief prayed for. But, if he applies to the mortgagee before filing his bill, to be allowed to redeem, and the mortgagee refuses to permit him to do so, or improperly resists his claim to redeem, the mortgagee may be compelled to pay costs to the

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complainant. (1 *Paige*, 617. *Id.* 48. 4 *Id.* 527.) Where an infant trustee is required to transfer the legal title, under an order of the court of chancery, the cestui que trust must pay the expense of the proceedings, to obtain the transfer. (*Sutphen v. Fowler*, 9 *Paige*, 280.) The lunatic, Charles Burr, is in equity a trustee of the premises in question, for the plaintiff. And a lunatic is entitled to the same protection as an infant. But if the plaintiff was entitled to costs, I think his claim for costs would be against the personal representatives of Jonathan Burr; and they are not parties to the suit. Where a contract is made, for the sale of land, the vendor is in equity immediately deemed a trustee of the vendee, of the real estate, and the vendee a trustee for the vendor, of the purchase money. (2 *Story's Eq. Juris.* § 1212. 6 *John. Ch.* 402, 405.) The vendee is treated as owner of the land, and it is devisable and descendible, as his real estate; and the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable, in the same manner, on his death. (2 *Story's Eq. Juris.* § 1212. 6 *John. Ch.* 402. 3 *Id.* 316.) The trust in the vendor, for the vendee, attaches to the land and binds the heirs of the vendor. (2 *Story's Eq. Juris.* § 790. 6 *John. Ch. Rep.* 402. 3 *Id.* 316.) The purchase money in this case, being, in equity, personal estate of the vendor, the bond and mortgage to be given to secure the payment of such money, belongs to such personal estate. If the plaintiff would have had a claim for costs against Jonathan Burr, had he been the defendant, such claim, since his death, can only be preferred against his personal estate; as the heir at law is not in default; and, as the personal representatives of Jonathan Burr are primarily liable for any damages sustained by the plaintiff in consequence of Jonathan Burr's violation of the contract, which the plaintiff is, either in equity or at law, entitled to recover. As the bond and mortgage to be given by the plaintiff, belongs to the personal representatives of Jonathan Burr, if the objection had been taken by the defendant, in the answer, or on the hearing, that such representatives had not been made parties to the suit, the cause must

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have stood over, until the plaintiff had made such representatives parties.

It must be referred to a referee, to ascertain the amount due from the plaintiff, for the purchase money of the premises mentioned in the bill of complaint, with interest, according to the terms of the parol agreement set forth in such bill; to settle the terms of the bond and mortgage to be given for the amount reported due; and to fix the time and times, when the sum, to be secured by such bond and mortgage, ought to be made payable. And on the coming in and confirmation of the report of such referee, the plaintiff must execute and deliver to the personal representatives of Jonathan Burr, such bond and mortgage; and the defendant John Cramer, as the committee of the lunatic Charles Burr, must convey the premises to the plaintiff, by a good and sufficient deed, to be settled by such referee; and such referee must summon the personal representatives of Jonathan Burr, as well as the parties to this suit, to attend the hearing before him. And neither of the parties to this suit is to be allowed costs, as against the others.

SAME TERM. *Before the same Justice.*

GREEN and wife *vs.* PUTNAM and wife and others.

If a deed is delivered as an escrow, it does not take effect until the condition is performed and the deed is delivered over to the grantee; and in the mean time the estate does not pass, but remains in the grantor.

A widow entitled to dower in an undivided share of premises held in common, even before the assignment of her dower, is a necessary party to a suit in chancery for the partition of the premises.

A widow is not entitled to dower in a vested remainder in fee belonging to her husband, limited on a precedent estate for life.

A right of dower, before assignment, is a right resting in action only. The widow may release it, but she cannot convey or assign it.

A widow, until the assignment of her dower, has no estate in the land, out of which such dower arises.

Barbour.
1b 500
152a 110

Barbour.
1b 500
52nd 99

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Where one tenant in common lays out money in improvements on the estate held in common, although the money so expended does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and a suitable compensation; or else, in the partition, it will assign to such tenant in common that part of the premises on which the improvements have been made.

To entitle a tenant in common to an allowance, on a partition in equity, for improvements made by him on the premises, it is not necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part to contribute their share of the expenses; nor a previous request to join in the improvements, and a refusal.

A grantee of the tenant in common who made the improvements on the premises, will be entitled to the same compensation for the improvements which the tenant in common himself would have been entitled to, had he continued the owner of an undivided share of the premises.

IN EQUITY. This cause was heard, on the pleadings and the testimony introduced by the parties, on the hearing. The bill was filed for a partition of a farm of about 100 acres of land, in the town of Milton in the county of Saratoga. The complainant, Hannah Green, claims, as devisee of her father, Daniel Thomas, one equal moiety of the farm. Daniel Thomas died seised of the same, in April, 1825. By his will, made and published previous to his death, he devised and bequeathed to his wife Eunice, the use of all his real and personal property, during her natural life; and, after her decease, he devised and bequeathed all such real and personal estate to his son Freeman Thomas, and his daughter Hannah Thomas, (one of the complainants,) their heirs, executors and assigns, forever. Freeman Thomas and his wife, on the 31st of October, 1825, conveyed all his right and interest in the farm to Mindwell Bridges, the mother-in-law of Freeman, subject to the life estate of Eunice Thomas. Mindwell Bridges, on the 8th of March, 1826, executed and delivered to George Peck a mortgage of all her right and interest in the farm, to secure the payment of \$1300. This mortgage was, in 1834, foreclosed in chancery; and George Peck, the mortgagee, became the purchaser of the premises, at the mortgage sale, subject to the life estate of Eunice Thomas therein; and received a deed therefor. George Peck, after such purchase, and in 1839, died intestate, seised of the premises purchased by

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him at such mortgage sale, leaving Elizabeth, wife of Rockwell Putnam, Eleanor, wife of William Kidd, James E. Peck and George Peck, his heirs at law. James E. Peck, after the death of his father, and on the 12th of June, 1839, conveyed all his interest in the premises to Betsey Peck, the widow of George Peck. Betsey Peck, on the 26th of June, 1839, conveyed such interest to William Kidd and George Peck. Eunice Thomas died on the 9th of August, 1846. Putnam and wife, Kidd and wife, and George Peck and his wife, are the parties defendants to the plaintiffs' bill. The defendants, in their answers, deny that the plaintiffs have any interest in the premises; and allege that Hannah Green, previous to the conveyance of Freeman Thomas to Mindwell Bridges, conveyed by deed, on or about the 31st of October, 1825, all her right, title and interest in the premises, to Freeman Thomas. And the answers of the defendants also allege, that the money advanced by George Peck, on the mortgage executed and delivered to him by Mindwell Bridges, was expended in the erection of a new dwelling house on the premises; and they insist, if a partition is decreed, that they are entitled to an account of, and allowance for, the moneys expended, by or under the direction of either Mindwell Bridges or Freeman Thomas, in necessary, permanent and beneficial improvements upon said premises. The bill alleges that Betsey Peck, the widow of George Peck, conveyed all her right and interest in the premises, by her deed on the 26th of June, 1839, to William Kidd and George Peck; but the answers do not admit that Betsey Peck, by such deed, conveyed her right of dower in the premises, to William Kidd and George Peck. And Putnam and wife and George Peck and wife, in their answer, insist that the whole of the premises, on the death of George Peck the elder, descended to his heirs at law, and became vested in them in fee, subject to the life estate of Eunice Thomas, and also subject to the right of dower of Betsey Peck. The bill alleges, and the answer admits, that the share of the defendant George Peck, in the premises, is subject to the lien of a mortgage thereon, executed by said George Peck and his wife to William Kidd; that the share of William

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Kidd and wife is incumbered by a mortgage thereon, executed by them to the said George Peck; and that there are no other liens or incumbrances, either general or specific, on the premises, or any share therein. The deed from Betsey Peck to George Peck and William Kidd was not introduced in evidence, on the hearing; nor was any evidence given of its contents. Freeman Thomas, who was examined as a witness by the defendants, testified that, after his father's death, he erected on the premises a dwelling house, to be used as a tavern, in the place of one which was consumed by fire, in the lifetime of his father, and expended in its erection moneys advanced by John Kelly, on a mortgage given upon the premises, by the witness and his sister Hannah; and also moneys of his own: and that the Kelly mortgage was paid up, out of the moneys advanced by George Peck the elder, on the mortgage given by Mindwell Bridges. Freeman Thomas also testified, that he acted as the agent of Mrs. Bridges. It appeared from the evidence, that the deed of the plaintiff Hannah Green to Freeman Thomas, of the date of the 31st of October, 1825, set up in the answers of the defendants, was executed in order to make her a competent witness, in a suit between the estate of her father and one Elliot; that the deed was left with Thomas Palmer as an escrow, and was not to be delivered to Freeman Thomas, or to be operative as a deed, unless the suit with Elliot proceeded; nor unless Freeman Thomas paid her \$500, for the same; that the deed was to be of no effect, unless the suit went on and the \$500 was paid; and that the suit with Elliot being afterwards settled, and the \$500 not having been paid to Hannah, the deed was, on her request, delivered up to her by Mr. Palmer. The mortgagee George Peck, before he received the mortgage from Mrs. Bridges, knew that Freeman Thomas had agreed to pay his sister Hannah \$500, for the deed of her half of the farm; and that no part of that sum had been paid to her. When Freeman commenced the erection of the house on the premises, to be used as a tavern, and while it was being erected, his sister Hannah objected to the size of the building, and insisted that it was too large; that it was larger than was neces-

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sary ; and said to Freeman Thomas, that if he put up so large a building she would have nothing to do with it, and would pay no more money, and would not borrow any more money to be expended in its erection.

Geo. H. Scott, for the plaintiff.

W. L. F. Warren, for the defendants Putnam and wife and George Peck and wife.

Geo. H. Mumford, for the defendants Kidd and wife.

PAIGE, J. No title passed, under the deed executed by Hannah Green, one of the plaintiffs, to Freeman Thomas. It was not delivered to Freeman Thomas. It was delivered by Hannah to Thomas Palmer, expressly as an escrow ; and it was not to be delivered to Freeman Thomas, unless the suit with Elliot went on, nor unless Freeman Thomas paid Hannah \$500. The delivery depended upon the performance, not only of one, but of both of these conditions. Neither of the conditions was performed. The suit with Elliot did not go on, and the money was not paid. By the settlement of the suit with Elliot, the main object of the conveyance—the making Hannah a competent witness—failed. The absolute delivery of a deed to the grantee, or to a stranger for him, is essential to its validity. If delivered as an escrow, it does not take effect until the condition is performed, and the deed is delivered over ; and in the mean time the estate does not pass, but remains in the grantor. (6 *Wend.* 669. 12 *John.* 421. 6 *Cowen*, 619. 2 *Hill*, 299.) The deed, in this case, was not to be delivered to the grantee, nor to take effect, until both the conditions were performed. The performance of one of the conditions, without the performance of the other, did not authorize the delivery of the deed to the grantee. The witness Palmer testifies, “that if the suit did not go on, the deed was not to take effect ; as the object of the deed was to make Hannah a witness in that suit.” This suit having been settled by Freeman Thomas, Palmer had no

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authority to deliver the deed to him. Palmer would not have been authorized to deliver the deed to Thomas, even upon his payment of the \$500. Thomas could not, therefore, under any circumstances, have been entitled to the deed, and Palmer properly returned it to Hannah. The plaintiff Green and Hannah his wife, are therefore seised in fee, in right of Hannah, of one undivided moiety of the premises in question; and the defendants, as the representatives of George Peck the elder, and as grantees of James E. Peck, are seised in fee of the remaining undivided moiety. George Peck the elder, as the purchaser, under his mortgage against Mindwell Bridges, acquired the title of Mrs. Bridges in the premises; which was only an estate in fee, in one undivided moiety of the premises, subject to the life estate of Eunice Thomas.

There is no evidence in the case, that the plaintiff Hannah Green, at the time of the execution of the mortgage of Mindwell Bridges to George Peck the elder, knew that it was intended by them that such mortgage should cover the whole premises; or, that Peck advanced the money on that mortgage, upon the faith of the validity of her deed to Freeman Thomas; or even that she had, at the time, any knowledge whatever of the giving of that mortgage. The defendants cannot therefore object that the plaintiffs are estopped from setting up their legal title to the premises, as against them, by Hannah's not disclosing her claim to the premises, to Peck, at the time of the execution of his mortgage. There is no evidence of any fraudulent concealment from Peck, by Hannah, of her title to the premises, or of any intent, on her part, to commit a fraud upon him; but there is sufficient evidence in the case, to show, that Peck had sufficient notice to put him on inquiry, as to Hannah's title. Previous to receiving his mortgage from Mrs. Bridges, he knew that Freeman Thomas had agreed to pay Hannah \$500 for a deed of her half of the farm, and that no part of the sum had been paid to her; he also knew that no deed, from Hannah to Freeman Thomas, of her half of the farm, had been recorded. In my judgment Peck, before he advanced any money on Mrs. Bridges' mortgage, had notice of the rights of the plaintiff

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Hannah Green, in the premises in question ; or had sufficient notice to put him on inquiry, as to such rights.

If Betsey Peck, as the widow of George Peck the elder, had a right of dower in one moiety of the premises, as alleged in the answer of Putnam and wife, and of George Peck and wife, she ought to have been made a party to the suit ; to enable the court, in case a sale is decreed, to give the purchaser a perfect title to the premises. (1 *Paige*, 469, 472. 2 *R. S.* 318, §§ 5, 6. *Id.* 329, §§ 79, 80. 3 *Paige*, 658. 7 *Id.* 410.)

During the life of George Peck, Eunice Thomas had a life estate in the premises. She survived George Peck. George Peck, therefore, had, during coverture, only an estate in fee in remainder, in a moiety of the premises, expectant on the determination of the life estate of Eunice Thomas. And, it seems to be well settled, that a wife is not entitled to dower, in a vested remainder in fee belonging to her husband, limited on a precedent estate for life. To entitle the wife to dower, her husband must have been seised of real estate in fact or in law, in fee simple, at some time during coverture. The seisin must be an actual corporeal seisin, or a right to such seisin. There can be no seisin in deed or in law, of a vested remainder limited on a precedent freehold estate. (1 *Co. Lit.* 32, a. *Cruise's Dig.* ch. 2, tit. *Dower*, §§ 12, 13, 15, 16. *Id.* ch. 3, §§ 19, 20. *Blood v. Blood*, 23 *Pick.* 80. *Eldredge v. Forrestal*, 7 *Mass. Rep.* 253. *Fisk v. Eastman*, 5 *N. Hamp. Rep.* 240. *Moore v. Esty*, 5 *Id.* 469.) (a)

If Betsey Peck had been entitled to dower, her conveyance to William Kidd and George Peck, even if it in terms conveyed all her right and interest in the premises, would not have transferred her right of dower in the whole premises, to the grantees. A right of dower, until legally assigned, is a right resting in action only. The widow may release it, but she cannot, before her dower is assigned, invest another person with the right to maintain an action for it ; nor can she convey or assign it.

(a) See also *Dunham v. Osborn*, (1 *Paige*, 634;) *Reynolds v. Reynolds*, (5 *Id.* 161;) *Matter of Cregier and others*, (1 *Barb. Ch. Rep.* 598.)

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Until the assignment of her dower, she has no estate in the land. (*Cruise's Dig. tit. Dower, ch. 4, § 2.* 13 *Wend.* 526. 10 *Id.* 414. *Id.* 528. 2 *Cowen*, 651. 17 *John.* 168. 20 *Id.* 413.)

The only remaining question is, whether the defendants are entitled, upon the partition or sale of the premises, to an allowance for the moneys expended by Freeman Thomas and Mindwell Bridges in the erection of the new dwelling house on the premises. The defendants claim that, as George Peck the elder derived his title to the premises from Freeman Thomas and Mindwell Bridges, they, as his heirs at law, are entitled to an allowance for all the moneys expended by Freeman Thomas and Mrs. Bridges, in necessary, permanent, and beneficial improvements upon the premises.

Where one tenant in common lays out money in improvements on the estate, although the money so expended does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition, without first directing an account, and a suitable compensation; or else in the partition it will assign to such tenant in common, that part of the premises on which the improvements have been made. (1 *Story's Eq. Jur.* §§ 655, 656, b. *Swan v. Swan*, 8 *Price*, 518. *Town v. Needham*, 3 *Paige*, 546, 553. *Id.* 470.) To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise, on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements, and a refusal. Such a request and refusal are undoubtedly necessary to sustain an action of assumpsit at law, by one tenant in common against another, for repairs, or the common law writ, *de reparatione facienda*. (*Mumford v. Brown*, 6 *Cowen*, 476. 4 *Kent's Com.* 370, 2d ed.) The defendants have no remedy by action at law, nor any direct remedy by bill in equity, against the plaintiffs, for their share of the expense of the dwelling house erected by Freeman Thomas and Mrs. Bridges; nor

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have Thomas and Mrs. Bridges any such remedy ; nor would they have had any such remedy had they continued the owners of the moiety of the premises.

At common law, one tenant in common could not even compel his co-tenant to account to him for taking more than his share of the profits, unless he could show he had made him his bailiff, or receiver. (*Co. Lit.* 200, b. 4 *Kent's Com.* 369, 2d ed.) This defect of the common law has been remedied by statute. An action of account at law can now be maintained, where one tenant in common, or joint tenant, has received more than his just proportion of the profits. (1 *R. S.* 750, § 9. 4 *Anne*, ch. 16.)

The statute of limitations is, no doubt, applicable, (as the plaintiff's counsel contends,) to an action at law, by one tenant in common, against his co-tenant for repairs; or to an action of account or bill in equity, between tenants in common, where one tenant in common has received more than his just proportion of the profits. (7 *John. Ch.* 117.) But it is not applicable to the equitable right of a tenant in common to an allowance for improvements made by him, on a partition of the premises, in equity. The right of a tenant in common to a suitable compensation for improvements made on the premises held in common, where there is no promise on the part of his co-tenant to contribute to the expense, is an equitable right, merely; amounting to an equitable interest in the premises, which a court of equity will recognize, in a decree for a partition. And a court of equity will not grant a partition, without allowing to the party the value of such interest. The money expended in the improvements does not, in strictness, create a lien on the premises; but equity will so far regard it as a lien as to refuse to interfere, unless compensation is made. (*Story's Eq. Jur.* 655, 656, b. 8 *Price*, 518.) The only remedy of the tenant in common who makes the improvements is, by a suit in equity, for a partition of the premises. The statute of limitations has, therefore, no application to the equitable claim for compensation for such improvements.

In *Town v. Needham*, (3 *Paige*, 546, 548,) where one tenant

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in common, supposing himself to be legally entitled to the whole premises, erected valuable buildings thereon ; it was held that he was entitled to an equitable partition of the premises, so as to give him the benefit of the improvements ; or, if that could not be done, that he was entitled to a compensation for those improvements. .

A court of equity administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties. It will adjust, by its decree, all the equitable rights of the parties interested in the premises. It is not restrained as a court of law is, to a mere partition of the lands between the parties, according to their interests in the same, and having a regard to the true value thereof. But it may, with a view to a more perfect partition of the premises, decree a pecuniary compensation to one of the parties, for equality of partition, so as to prevent any injustice or unavoidable inequality. (*Story's Eq. Jur.* §§ 654, 656, *a.* 2 *R. S.* 330, § 83.) So a court of equity will assign to the parties respectively, such parts of the estate as will best accommodate them, and be of the most value to them, with reference to their respective situations in relation to the property before the partition. (*Story's Eq. Jur.* 656, *b.*)

As the defendants derive their title through George Peck the elder, to an undivided moiety of the premises, from Freeman Thomas and Mindwell Bridges, they are entitled to the same compensation for the improvements made by Thomas and Mrs. Bridges on the premises, which the latter would have been entitled to had they continued the owners of such moiety. It appears from the evidence, that a part of the expense of the dwelling house erected by Freeman Thomas, was paid by Daniel Thomas, in his lifetime, and out of his estate, after his death. It also appears that Hannah, when Freeman Thomas commenced the erection of the house, and while it was being erected, objected to the size of the building, and insisted that it was larger than was necessary, and declared to him that if he persisted in putting up so large a building as the one he had commenced, she would have nothing to do with it. If a larger building was erected than was proper and necessary, and if it

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did not add more to the value of the premises than a building of smaller size would have done, the defendants, especially after this notice from Hannah to Freeman, are only entitled to compensation for the expense of the erection of a building of the proper size. The building having been erected during the existence of the life estate of Eunice Thomas, the defendants are not entitled to compensation for the moneys expended by Freeman Thomas and Mrs. Bridges in its erection, but only to a suitable compensation for such proportion of the value of the building, at the death of Eunice Thomas, as the amount expended by Freeman Thomas and Mrs. Bridges, in its erection, bears to the whole expense of the building. And if the plaintiffs, or either of them, contributed any thing towards the erection of the building, they are entitled to a similar compensation. The value of the building, at the death of Eunice Thomas, must be estimated in reference to the value of a building of the proper dimensions for a farm house on the premises in question, and not for the purposes of a tavern. If any one of the parties has received more than his or her just proportion of the rents and profits of the premises, since the death of Eunice Thomas, or has committed waste on the premises, he or she must account for the same.

A decree must be entered declaring the rights and interests of the parties, in the premises, to be as stated in the bill of complaint. And it must be referred to a referee to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made without great prejudice to the owners of the same; and if he arrives at the conclusion that a sale will be necessary, he must specify the same in his report, with the reasons which render a sale necessary; and, in such a case, he must ascertain and report as to the specific and general liens, as required by rule 125. Such referee must also ascertain and report the amounts respectively expended by Freeman Thomas and Mindwell Bridges, and by the plaintiffs, or either of them, out of their own moneys, in the erection of the new dwelling house on the premises, referred to in the answers in this suit, and the

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whole expense of the building ; and also the value of such building at the time of the death of the said Eunice Thomas, estimated in reference to the value of a building of the proper size for a farm house on said premises, and not for the purposes of a tavern. And such referee must also ascertain and report whether either of the parties to this suit has received more than his or her just proportion of the rents and profits of the premises, since the death of Eunice Thomas ; or has committed any waste on the premises. All further questions and directions are reserved until the coming in of the report of such referee.

WASHINGTON SPECIAL TERM, September, 1847.
Hand, Justice.

SCHERMERHORN and wife *vs.* MERRILL and WILCOX.

A defendant cannot move to dissolve an injunction on account of want of due diligence on the part of the plaintiff in prosecuting the suit, except in cases where the defendant cannot himself expedite the cause. Where the situation of the cause is such, that the defendant may proceed therein without waiting for the plaintiff, the plaintiff's inactivity is no cause for dissolving the injunction.

An injunction, properly allowed in the first instance, will not be dissolved on the coming in of the answer, in the absence of any laches on the part of the plaintiff, unless the defendants, in their answer, have positively denied all the equity of the bill under oath.

And where the bill charges fraud, it is not sufficient that some of the defendants have denied all fraud as to themselves, if their title or rights may be affected by the fraud charged against the other defendants. If the act charged as fraudulent forms one link in their title, and is charged to have been done by another, through whom they hold, and under circumstances which preclude them from the benefit of the position of bona fide holders without notice, it is not sufficient that they deny all fraud on their part.

But where the answer of a defendant answering under oath, from his own knowledge, denies the whole equity of the bill, and makes a clear title in himself, in such a way that it cannot, if the answer be true, be affected by the fraud charged in the bill and not denied, his case is severed from that of his co-defendants, and stands upon its own merits.

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82h	230
82h	234

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Where the plaintiff waives an answer on oath from all the defendants, and one of them answers on oath, denying the whole equity of the bill, he may move to dissolve the injunction, upon his answer, notwithstanding his co-defendant has put in an answer without oath.

The right and title of a judgment debtor to real estate belonging to him which has been sold by the sheriff upon execution, is not divested, by the sale, until the expiration of the fifteen months allowed for redeeming.

And the deed given by the sheriff to the purchaser at a sale upon an execution will not relate back, so as to give to the purchaser a legal estate which will merge a mortgage previously given to him by the judgment debtor, upon the land sold.

Even after the time for redemption has expired, the naked legal estate continues in the judgment debtor. And the purchaser's interest, before deed, is but a lien, or a conditional right.

The doctrine of merger applies only where there is a legal estate; as where the title and a lien, or a legal and an equitable, or a larger and a lesser, estate meet.

IN EQUITY. This was a motion by the defendant Merrill, to dissolve an injunction restraining him from foreclosing a mortgage on certain land in Salem, Washington county. Elam Phillips, on the 1st of March, 1842, held the land in question by perpetual lease, subject, with other lands, to an annual rent of \$280, and on that day he and his wife executed a bond and mortgage thereon to Eli Ames, to secure ~~\$459.60~~, payable at the expiration of two years, with annual interest; which mortgage was duly recorded on the 8th of March, 1842. The defendant Merrill, in his answer, states his belief that this was given to secure the purchase money. Proudfit & Fitch recovered a judgment against Phillips for about \$188, which was docketed on the 30th of March, 1842. The land was sold to satisfy this judgment on the 14th of March, 1844, and bid off by Ames for \$100. He received the usual certificate of sale, a duplicate of which was also filed. Merrill states that he is informed and believes that Ames, at the time of this sale, was assignee of this judgment. On the 11th of January, 1845, ~~Ames assigned~~ the bond and mortgage and certificate of sale to the defendant Wilcox; \$550 being the consideration expressed in the assignment of the mortgage. The plaintiff alleged that he believed the consideration was only paid for the certificate, and that in truth no consideration was paid for the mortgage, and that Ames considered it merged and satisfied by his purchase

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of the land at the sheriff's sale. On the 24th of May, 1845, Wilcox and the defendant Merrill settled, and Wilcox was found indebted to Merrill in the sum of \$250. On the same day Wilcox bought and received from Merrill, a horse for \$100, and at the same time assigned the bond and mortgage to Merrill as collateral security for the payment of the \$350 and interest thereon on the 1st day of March, 1846, and if that sum was not then paid the assignment was to be absolute; and it was agreed that Merrill might collect the money and pay the surplus, if any, over and above the \$350 and interest and costs, to Wilcox. Wilcox stated to Merrill, when he took the assignment of the mortgage, that it was a valid lien upon the land, which was good security for \$500 or \$600; all which Merrill stated he believed. Merrill denied all fraud or concealment. On the 24th of June, 1846, Merrill commenced proceedings for a statute foreclosure, which were stopped by the injunction in this cause, now sought to be dissolved. The plaintiff alleged that on the 14th of November, 1845, he and his wife executed to Wilcox an agreement to convey to Wilcox certain Virginia lands, for which they were to receive a deed of this land in Salem, free of all incumbrances except the rent. That after the contract was delivered, Wilcox proposed they should take an assignment of the sheriff's certificate, which they did, and he assured them that the mortgage was not a lien upon the premises, and that he had left it in Saratoga, but would get it and cancel it, or assign it to them as they should prefer, which he had failed to do, though he had at three several times, since, renewed his promise to do so. The plaintiff took possession of the property on the 1st of April, 1846, in pursuance of his agreement with Wilcox, and with his consent, and on the 12th of August, 1846, received a deed from the sheriff, by virtue of the assignment of the sheriff's certificate to him. Merrill answered under oath, and Wilcox not under oath. The cause was at issue as to both defendants, on the 5th of February, 1847.

H. W. Merrill, in person, and *C. F. Ingalls*, for the motion.

C. L. Allen, for the plaintiffs.

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HAND, J. Each party claims the benefit of a rule of practice. The defendant contends that the plaintiff has neglected to expedite the suit since the cause was at issue. Want of diligence is often ground for dissolving an injunction. (*Higgins v. Woodward*, *Hopk. Rep.* 342. *Depeyster v. Graves*, 2 *John. Ch. Rep.* 148. *Grey v. Duke of Northumberland*, 17 *Ves.* 281. 3 *Dan. Prac.* 1896. 1 *Hoff. Prac.* 360. *Seebor v. Hess*, 5 *Paige*, 85. *Waffle v. Vanderheyden*, 8 *Id.* 46. *Ward v. Van Bokkelen*, 1 *Id.* 100.) But these are cases where the defendant could not move on the cause; and in such cases, as where the plaintiff neglects to bring in proper parties or bring to trial an issue at law awarded in an equity case, this rule applies. But where the situation of the cause enables the defendant to proceed, the reason of the rule does not exist, nor, consequently, the rule itself. On the other hand, the plaintiff insists that Merrill cannot move to dissolve the injunction until all the defendants have denied the equity of the bill under oath, which the defendant Wilcox has not done in this case. That from the nature of this case, Merrill has not denied, and cannot deny, the whole equity of the bill. The whole equity of the bill must be positively denied under oath, before the injunction will be dissolved, where it was properly allowed in the first instance, and the plaintiff is not chargeable with laches. (*Ward v. Van Bokkelen*, 1 *Paige*, 100. *Fulton Bank v. New-York and Sharon Canal Co.* 3 *Id.* 312. *Wakeman v. Gillespy*, 5 *Id.* 112. *Roberts v. Anderson*, 2 *John. Ch. Rep.* 202. *Manchester v. Dey*, 6 *Paige*, 296. *Hollister v. Barkley*, 9 *N. Hamp. Rep.* 230.) And where the bill charges fraud, it is not sufficient that some of the defendants deny all fraud as to themselves, if their title or rights may be affected by the fraud charged against the other defendants. If the act charged as fraudulent forms one link in their title, and is charged to have been done by another, through whom they hold, and under circumstances that preclude them from the benefit of the position of bona fide holders without notice, it is not sufficient that they deny all fraud on their part.(a)

(a) See *Mallett v. The Weybossett Bank and others*, *supra*, 317.

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Such was the case of *Roberts v. Anderson*, (2' *John. Ch. Rep.* 202.) There all parties claimed title from a common source. The defendants were honest enough, and swore they believed those from whom they derived title were; but this was held not sufficient. The answer might be true as to those parts stated upon their own knowledge, and yet their title be wholly tainted with fraud. But where the answer of a defendant answering under oath, from his own knowledge, denies the whole equity of the bill, and makes a clear title in himself in such a way that it cannot, if the answer be true, be affected by the fraud charged in the bill and not denied, his case is severed from that of his co-defendants, and is perfect; and he stands upon his own merits. How far the express admission of the fraud in the sworn answer of a co-defendant would affect a motion to dissolve an injunction, is a question which does not arise in this case. If the plaintiff waives an answer upon oath from all the defendants, and one of them answers on oath, denying the whole equity of the bill, he may move to dissolve the injunction, upon his answer, notwithstanding his co-defendant has put in an answer without oath. If the rule were otherwise, a complainant, by waiving a sworn answer, would put it out of the power of a defendant to procure the dissolution of an injunction on bill and answer, although all the equity of the bill was denied by his answer.

The defendant Merrill, in this case, has denied the whole equity of the bill on his part, unless the mortgage was merged; which is the principal question in the case. Wilcox, on the 24th day of May, 1845, held both the certificate and the mortgage. The holder of the certificate (if no redemption should be made,) would be entitled to a sheriff's deed on the 15th day of June, 1845. As the assignment to Merrill was made nearly ten months before the plaintiffs had any concern with the property, it is of no importance whether the consideration of the assignment was a pre-existing debt or not; and the plaintiffs, if they succeed, must do so because the mortgage was no longer a valid lien. I cannot think that leaving the certificate in the hands of Wilcox, operates against Merrill, on the ground that

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he thereby put it in the power of Wilcox to defraud some one, and therefore must, of two innocent persons, be the sufferer. In the view I take of this case, the certificate was very properly left with Wilcox. Ames, about ten months after he bid off the premises, assigned the mortgage to Wilcox for the sum of \$550, as expressed in the assignment, and I do not find that the plaintiff is in a condition to insist that this was a fictitious consideration. At this time, all parties treated the mortgage as valid and subsisting. Between three and four months afterwards, Wilcox and Merrill treated it in the same way. An assignment of the certificate accompanied the assignment to Wilcox, but these instruments were separated in the *subsequent* transaction between the defendants, which the plaintiffs contend could not legally be done. But I have not been able to concur in that view. Had the legal title to the land been in Ames, and afterwards in Wilcox, this case could not be distinguished from that of *James v. Morey*, (2 *Cowen*, 246.) And see *Skeel v. Spraker*, (8 *Paige*, 182;) *Millspaugh v. McBride*, (7 *Id.* 509;) *Russell v. Austin*, (1 *Id.* 195;) *McKinstry v. Mervin*, (3 *John. Ch. Rep.* 446.) In *James v. Morey*, the equity of redemption in part of the land was in Wattles 6½ months, and he declared his legal title good, and offered to convey, but afterwards assigned his mortgage, and then mortgaged, in the form of a conveyance, the premises, to a person ignorant of the assignment of the mortgage. In some of the opinions delivered in the court of errors in that case, Morey was blamed for not inquiring respecting the mortgage. Here, inquiry was made, and answers calculated to awaken the suspicions of a purchaser, reasonably vigilant, were given. In that case the mortgagee assigned the mortgage to secure a pre-existing debt. In this, a portion of the consideration was the same, and the remainder was for property sold to and received by the assignor, from the assignee, at the time of the assignment. Had the equity of redemption been in Wilcox, the case would have been nearly parallel in all respects with that of *James v. Morey*, and the distinctive characteristics, where they exist, are the most favorable to the assignee in this case. That case was well considered, and has never been

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shaken; and it would be a work of supererogation to bring to its aid other authorities.

But I have not been able to discover the application of the law of merger to this case. At the time Wilcox assigned the mortgage to Merrill, the legal estate was in Phillips. The statute is decisive on this point. It declares that "the right and title of the person against whom the execution was issued, to any real estate which shall be sold thereby, shall not be divested by such sale until the expiration of 15 months from the time of said sale." (2 R. S. 373, § 61.) It is true, after a deed is given, it has a retroactive effect as far as respects the punishment of those who have injured the property after the sale, but for no other purpose. The action of waste is given in such cases. (2 R. S. 336, § 20.) Waste may be stayed before the deed. (*Idem*, 337, § 23.) But the sheriff's deed does not relate back, so as to give a legal estate that will merge a mortgage which the purchaser may have assigned, while the legal estate was in the debtor. If this were so, it might in this case work injury to the purchaser, by letting in a claim for dower, and perhaps liens intermediate the mortgage and judgment. The *judgment* is a lien until a sale; then *that* is extinguished, and the purchaser has a lien *by virtue of the sale*, until the expiration of the 15 months that must elapse before the deed can be given. Up to that time the debtor has the right to the undisturbed use and possession of the land, (2 *Wend.* 507,) unless proceeded against in chancery; and there it is treated as real estate. (10 *Paige*, 598.) He may redeem during the year, and during the three months thereafter, confess a judgment or give a mortgage by which the purchaser may have the land redeemed from him. The purchaser may also accept his money up to the last moment, (and perhaps after the 15 months;) and this too from a stranger. And such payment and acceptance alone, releases his interest, which is wholly incompatible with the notion of a legal estate. (15 *Wend.* 248.) It has been held that a conveyance by the sheriff to another, in pursuance of the purchaser's parol assent, carries the title. (1 *Wend.* 46.) Even after the time for redemption has expired, the naked

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legal estate continues in the debtor. (5 Cowen, 164.) The purchaser's interest, before deed, is but a lien. (7 Cowen, 554, 660. 20 John. Rep. 3. 2 Wend. 507, 570. 4 Cowen, 133. 1 Denio, 634. 5 Cowen, 164.) It is difficult to understand how one lien can merge in another. The doctrine of merger has been supposed to apply only where there was a legal estate; as where the title and a lien, or a legal and an equitable, or a larger and a lesser estate, meet. The interest of the purchaser has been called a "conditional right." (*Per Woodworth Justice, in Jackson v. Budd*, 7 Cowen, 660.) It may be similar to the right under a tax deed of occupied lands, before notice, which Cowen, Justice, thought analogous to a mortgage. (*Bush v. Davison*, 16 Wend. 556.) Perhaps the remedies on the mortgage in this case, are now confined to the land. (*Tice v. Annin*, 2 John. Ch. Rep. 128. *Russell v. Allen*, 10 Paige, 255.) But that does not affect this question.

In this case, there being no merger, the equity of the defendant Merrill has priority in time, and, as it does not appear that Wilcox made any written agreement, or that the plaintiff has paid any part of the consideration, Merrill has also the better equity, to the extent of his claim, at least. (*Berry v. Mutual Insurance Co.* 2 John. Ch. Rep. 603. *Grimstone v. Carter*, 3 Paige, 436. And see 3 Sugden on Vendors, 80, 418, note 1, 6th Am. ed. 1 Fonb. 321, 350. *Muir v. Schenck*, 3 Hill, 228.) Although the plaintiffs may now have the legal title, they have no such equity as will overreach the lien of Merrill. The injunction must be dissolved as to Merrill, so far as to allow him to foreclose the mortgage, and retain out of the proceeds of the sale, \$350 and interest thereon from the 24th day of May, 1845, and also the costs of foreclosure. The balance, if any, of said proceeds, he must bring into court to be subject to its further direction; unless the plaintiffs, within 20 days after notice of this order, shall bring into court for the use of Merrill, the said sum of \$350 and interest thereon from the 24th day of May, 1845, and also the costs of the foreclosure already incurred; in which case the injunction is to be retained. If the plaintiffs bring the money into court, they are to be at

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lowed to do so without prejudice to their rights, as they shall be settled by the final decree in the cause. Neither party is to have costs on this motion.

SAME TERM. *Before the same Justice.*

RUSSELL vs. LANE and others, administrators, &c.

A creditor, on presenting a claim against an estate, to administrators, under 2 R. S. 88, § 35, is not bound to exhibit the evidences of his claim, or make oath of the justice thereof, unless required to do so by the administrators.

The fact that a claim was presented to administrators previous to the publication of notice to creditors, does not render the presentation invalid. A creditor has a right to present his claim to the representatives of the deceased at any time; and is not confined to the six months succeeding the first publication of the notice.

The section of the revised statutes which provides that if an executor or administrator doubts the justice of any claim so presented he may enter into an agreement in writing to refer the same, extends to all claims presented to the executor or administrator, and is not confined to those only which are specified in that section.

An executor or administrator may consent to refer a claim presented to him, notwithstanding he has not required vouchers, or an affidavit of the justice of such claim.

Power of counsel to bind their clients, by giving information.

THIS was a motion, by the plaintiff, for an order directing the defendants to pay to the plaintiff the costs of suit. It appeared by the affidavit of the plaintiff's attorney that the suit was brought to recover an account the plaintiff claimed against J. Burr, the defendant's intestate, for professional services, as attorney, solicitor and counsellor. In April, 1845, he presented the account to Mr. Lane, one of the administrators, and requested payment. Lane declined to pay the same, but said he would examine it, and give the plaintiff an answer. Hearing nothing from the administrators, in December, 1845, a copy of the account was verified by the affidavit of the plaintiff, according to the statute, and the attorney went to Troy to present

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the same to Lane, with instructions, if he refused to pay it, to offer to refer the same. Lane being absent, the attorney called on a gentleman who he alleges was the counsel for the administrators in all matters relating to the estate, and counsel in this suit and partner of the defendant's attorney, and left the account and affidavit with him, and requested him to ask Lane to pay it, and if he declined, then to offer to refer it. That person replied, it would be useless to do so, as Lane had already made up his mind to reject the claim entirely, and had a few days before so written to the plaintiff; and that he was authorized to say Lane would not consent to a reference, as he considered the credit of \$50 which the plaintiff had given on the account, was ample compensation for all he had done; but that he would present the account to him. That eight or ten days afterwards, he saw the defendant's counsel again, who told him he had presented the account and affidavit to Mr. Lane, who refused to allow or refer the claim, and that the plaintiff might sue as soon as he pleased, as the account was absolutely rejected. The suit was commenced in April, 1846, after the plaintiff's attorney had received from his client a letter of instructions to that effect, enclosing the following: "David Russell, Esquire, Dear sir: I have submitted to the parties interested in the settlement of the estate of the late Jonathan Burr the bill presented by you for professional services, amounting to about \$1480. They do not consent to the payment of it, and therefore, in compliance with their wishes, I do reject the bill. Yours respectfully. J. L. Lane, adm'r, &c. of Jonathan Burr, dec'd. Troy, Dec'r 18, 1845." It was also shown that this cause had been referred to three referees, who reported \$300 due to the plaintiff.

In opposition to the motion, the defendant Lane swore that an account of the plaintiff against the estate which was affixed to his affidavit, and which was not verified and contained no credit of \$50, was the only account ever presented or shown to him, and was handed to him in the spring or summer of 1845, by the person spoken of in the affidavit of the plaintiff's attorney as the counsel for the estate, and that it was never presented by

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the plaintiff's attorney. That he never heard of any account verified by the affidavit of the plaintiff, or in which was a credit of \$50 or any other sum, until service of the papers for this motion. That the person referred to as being his counsel never presented any such account, nor did Lane ever tell him, or any one, that he would not refer the claim. That he had never refused nor been unwilling to refer, nor authorized any one to say so. That notice to creditors to produce their claims was given, by order of the surrogate, and published in July, 1845. The affidavit stated nothing in relation to any conversation with the plaintiff's attorney. The person alleged in the affidavit of the plaintiff's attorney to be the counsel for the estate, swore that the account spoken of by Lane was left by the plaintiff or his attorney, with him, in the spring of 1845, to be presented to Lane, and was so presented by him previous to July, 1845, and was the only account he ever presented to Lane; and that he never asked Lane to refer the same, nor did Lane authorize or instruct him to refuse to refer. That no other account had been left with, or presented to, him, and no account verified by the affidavit of the plaintiff had been presented to or left with him. Nor did he recollect of seeing or hearing of any account on which \$50 was credited. That the plaintiff's attorney was mistaken in the statement contained in his affidavit of the conversation between them. At the foot of the account mentioned in both of the opposing affidavits, there was a certificate of a counsellor at law, that the plaintiff was counsel for the decedent, attended the terms of the court to argue, &c. and that he thought the charge reasonable.

C. L. Allen & C. Stevens, for the motion, cited *Knapp v. Curtiss*, (6 *Hill*, 386;) *Gansevoort v. Nelson*, (*Id.* 389;) *Harvey v. Skillman*, (22 *Wend.* 571.)

I. W. Thompson, for the defendants, cited *Bullock v. Bogardus*, (1 *Denio*, 276.)

HAND, J. The affidavits in some particulars are in conflict, but not so much, in most of the material parts, as would seem

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at first view. I cannot doubt, after carefully reading the papers, that the discrepancies originated from misrecollection or pure mistake. The plaintiff's attorney may have left the first account with the defendant's counsel and not with Mr. Lane, and yet, as he states, have conversed with the latter in relation to it. And he may also have conversed with the counsel in December about the matter, but, inadvertently, omitted to leave with him the verified account. Mr. Lane is silent as to a conversation with the plaintiff's attorney in the spring of 1845. His counsel says the plaintiff's attorney is mistaken in his statement of the conversations between them and which the plaintiff's attorney says took place at Troy, in December, 1845, but I do not understand him as denying that they then and there had conversations in relation to this matter; nor does he state wherein the attorney is mistaken as to those conversations. A general allegation of a mistake in relating a conversation, without any specification, is in truth no denial, where the opposite party makes a full statement of the particulars. It gives no information, forms no issue. This would be the case if there were but a slight and immaterial error, and yet both affidavits be substantially true. I must therefore take this part of the moving affidavit to be correct in substance.

It seems to me that the following is probably a fair version of the case as made out. The plaintiff claimed \$1480 as due to him from the decedent at the time of his death, for professional services. He or his attorney, in the spring of 1845, presented a copy of the account to the counsel of the administrators, who presented it to the administrator. During that spring the plaintiff's attorney saw one of the administrators, Mr. Lane, and requested payment of the account. He declined paying it, but said he would examine the matter and inform the plaintiff or the attorney whether it would be paid. In December, 1845, the plaintiff's attorney saw the counsel of the administrators, and again a few days after, and on both occasions conversed with him about the claim, and was informed by him, (as he says,) at the first interview, that the administrator had decided to reject the claim, and had so written to the plaintiff, and

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would not refer ; and at the second, that his client refused to pay or refer the claim. In December, 1845, the administrator, by letter, informed the plaintiff that after submitting the matter to the parties interested in the estate, and in compliance with their wishes, he rejected the claim. This suit was commenced in May, 1846, and \$300 found due to the plaintiff. What then are the rights of the parties? The verification of the claim under the statute is in no respect important to make out the plaintiff's case. That is not necessary, unless the administrator require it. (2 R. S. 88, § 35. *Gansevoort v. Nelson*, 6 *Hill*, 389.) Nor does the fact that the claim was presented before notice to creditors was published make any difference. The creditor has a right to present his claim to the representative of the deceased at any time. The estate may be settled without notice, and giving notice or not is entirely optional with the executor or administrator ; and if done it is done for his convenience and safety. He may run some hazard by settling without it, but I agree with Mr. Justice Beardeley, in *Bullock v. Bogardus*, (1 *Denio*, 276,) that payment of costs is no part of that hazard. After the expiration of eighteen months from granting letters, proceedings to compel him to account, or by him to account, may be instituted, whether he has published notice or not. (2 R. S. 88, § 34 ; 92, § 52 ; 95, § 70.) But if presentation of the claim *during* the publication of the notice were necessary, rejecting the same claim during the time of the publication would waive the presentation within that time. Formally presenting it after it had been deliberately and distinctly rejected, would be idle. It is not therefore a valid objection to this motion that the claim was not presented during the six months of publication. (2 R. S. 90, § 41.) The motion has been mainly pressed upon two grounds. The first is that payment of the demand was unreasonably neglected and refused. It is contended that the long delay in coming to a decision, for until then there could be no reference, as it could not be known whether it would be disputed or rejected, was unreasonable, and might well induce the creditor to suppose there would be no arrangement, nothing yielded except upon compulsion. It is

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true that \$300 has been found due to the plaintiff, and want of assets is not pretended. But a reduction of the demand to nearly one-fifth of the sum claimed, is an answer to this part of the plaintiff's case. In such cases an administrator is deemed justified in his resistance. Perhaps even mere silence, a disingenuous refusal to allow, reject or dispute the claim, might, in a proper case, warrant the court in awarding costs, although the demand has been greatly reduced. But this is not such a case. Long before the suit was commenced, the claim was distinctly rejected.

The only remaining ground upon which the plaintiff rests his motion is, that the administrator refused to refer. On the argument I had some doubt as to the effect, in this case, of the want of vouchers, &c. and of the absolute rejection of the claim by the defendants. The words of the statute are, "if the executor or administrator doubt the justice of any claim *so presented*, he may enter into an agreement in writing" to refer, &c. Can this be done where vouchers have not been exhibited in support of the claim, and it has not been verified as required in the preceding section; that section, in order, being the proper antecedent of the paragraph above cited? And if the absence of these is no objection to a reference, then can the administrator agree to a reference where the claim is wholly rejected? I think the phrase "any claim so presented," includes all claims presented to the executor or administrator, and not those only which are specified in § 35; and that the requirement of vouchers and an affidavit is not a prerequisite to authorize him to agree to a reference. The power to refer is given by the statute, and perhaps it was intended that he should require the vouchers and affidavit, and then if he still doubts the claim the administrator is warranted in consenting to a reference. (See the remarks of *Bronson, J.*, 6 *Hill*, 392, and of *Cowen, J.*, 22 *Wend.* 572.) But such, it is believed, is not the construction given to the statute by our courts, or by the profession. The executor or administrator may, from the first, understand the nature of the claim, and be satisfied it cannot be adjusted without the intervention of third persons; and he is not compelled

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to require an affidavit in all cases. As to the rejection, if the claim is admitted, if its justice is not doubted, there is nothing to refer. (1 *Denio*, 276.) It is when he has "doubt," that the administrator can refer. And it may be asked, does he doubt when, after examination, he rejects it? If he merely doubt it, he should not absolutely reject it. That is a final disposition of it, unless the claimant sues in six months. But the language of the section barring the claim unless prosecuted within six months, implies that the executor or administrator may agree to a reference after he has rejected the claim. The statute is, "if a claim be disputed or rejected" by him, and the same shall not have been referred, &c. If the non-requirement of vouchers and affidavit, or the rejection of the claim, prevented the reference, this would be tantamount to a refusal to refer. But they do not; and therefore the plaintiff's case, if sustained, rests upon an actual refusal to refer.

This is a question of fact; and after a careful examination of the statements on both sides, I think the plaintiff has made out this branch of the case, if the information given by the defendant's counsel could affect them. The opposing affidavits deny that Lane had refused to refer, or had authorized any one to say so; but they do not deny that the gentleman alleged to be the counsel of the defendants in all matters relating to the estate was such counsel; and the plaintiff's attorney says he informed him the administrators would not consent. I cannot say, upon these affidavits, that he was not authorized to suppose they would not refer. And I have come to the conclusion, though with some hesitation, that although the counsel had no right to refuse to refer, yet his position was such that the opposing party had a right to rely upon this information. It is by no means necessary to this conclusion to impute unfairness to the defence. Probably there has been misapprehension; and possibly if the defendant's counsel had stated the particulars of his recollection respecting the alleged conversation with the plaintiff's attorney, it might have appeared how that misapprehension arose, and what grounds, if any, the plaintiff or his attorney had for supposing a suit the only mode of redress.

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Although statements made by his attorney or counsel will not estop a party, in many cases, yet on a mere question of costs, depending entirely upon the mode of prosecution, I think they, if pertinent to the case, should have weight. Mere matter of conversation with the attorney is not admissible in evidence. (*Perkins v. Hawkshaw*, 2 *Stark. Rep.* 234. *Wilson v. Turner*, 1 *Taunt.* 398.) But the acts and admissions of the attorney in the prosecution or defence of a cause always bind the client, and this is sometimes the case, though made or done before the actual pendency of the suit. (*Gainsford v. Grammar*, 2 *Camp.* 9. 1 *Phil. Ev.* 105. And see *Griffiths v. Williams*, 1 *T. R.* 710; *Standage v. Creighton*, 5 *C. & P.* 406; *Elton v. Larkins*, *Id.* 385; *Trice v. Hemming*, 7 *Wend.* 619; *Doe v. Bird*, *Id.* 6; *Burroughs, J. in College v. Horn*, 3 *Bing.* 119; 1 *Stark. Ev.* 365.) Perhaps counsel cannot, by virtue of their authority as such, consent or refuse to refer a claim presented against an estate; but where he is known and admitted to be the general legal adviser of the representatives, it is believed they should be deemed bound, on the question of costs at least, by any information he communicates to claimants, respecting a consent or refusal to refer. Upon the papers before me I think the plaintiff was authorized to take this view of the matter. The motion must be granted, with costs of the motion, all to be paid out of the estate.

 SAME TERM. *Before the same Justice.*

BUTLER vs. BENSON.

Appeals from the sentences or decrees of surrogates to circuit judges, pending before such circuit judges on the first Monday of July, 1847, were not transferred to the supreme court by the new constitution, nor by the judiciary act of 1847.

Such appeals were special proceedings pending before the circuit judges, and were provided for by the 76th section of the judiciary act. They may, by an order of

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the supreme court, be transferred to any justice thereof, but cannot be heard by the supreme court itself; except upon an appeal from the decision of the justice. What things are now necessary to the due execution of a will.

It seems the subscribing witnesses should sign the same in the presence of the testator.

The testator must subscribe his name at the end of the will; which subscription may be by his autograph, or by his mark; or, if he is unable to write, by another person in his presence and by his express direction.

The subscription must be made in the presence of the attesting witnesses, or must be acknowledged to them. The acknowledgment may be made to the witnesses separately, or the testator may subscribe and publish in the presence of one, and acknowledge his signature before another. When he subscribes or acknowledges he must declare the instrument to be his last will and testament. And there must be at least two attesting witnesses; each of whom must sign as a witness at the end of the will, at the request of the testator, and at the time of the subscription or acknowledgment thereof and publication by the testator.

If the subscribing witnesses to a will fail to prove the instrument, other witnesses may be called. Though the proof, in such cases, should be very clear.

In ordinary cases, where persons are called in to witness a paper, which they do, in the presence of the testator; he at the same time subscribing it, and declaring that it is his last will and testament, a request to the witnesses to sign their names as witnesses may be presumed.

Under our statute of wills the testator must subscribe the will; and he must do this, or acknowledge it, in presence of the witnesses. And though he has subscribed it, if the subscription was not in the presence of the witnesses, publication is not a sufficient acknowledgment.

A witness may use a memorandum to refresh his recollection. But it is not evidence to go to the jury; even though he swears he thinks it correct. He may refresh his memory, and then, if his recollection recalls the transaction, that recollection is testimony to go to the jury. The witness must be conscious of the reality of the matters he swears to, at the time he testifies. It is not sufficient that his mind recurs to the memorandum, and that he himself believes that true.

How far the attestation clause in a will can be used as a memorandum to refresh the memory of the scrivener who drew the will, as to the facts attending its execution.

The mere unsupported belief of a witness is not evidence. Belief, to be admissible, must rest upon sufficient and legal foundation. No belief, however confident, will suffice, without recollection.

Where the witnesses to a will are dead, or from the lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence existing, presumes the instrument properly executed, if there are no circumstances of suspicion; particularly where the attestation clause is full.

Old age alone, in a testator, is not a sufficient ground for presuming imposition upon him.

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THIS was an appeal by Butler from the decision of the surrogate of the county of Washington, admitting to probate an instrument purporting to be the last will and testament of Cole Benson, deceased, on the application of Sanford R. Benson, the respondent. There were two subscribing witnesses, John F. Beadle and Elijah Brownell; who, together with one Peleg Thomas, were called by the respondent to prove the execution of the will. The substance of their testimony is stated in the opinion of the court.

J. R. Doolittle, for the appellant.

C. F. Ingalls, for the respondent.

HANEY, J. A preliminary question arises in this case upon the construction of the judiciary act. The appeal to the circuit judge of the 4th circuit was taken, and the return made, in the year 1846, and the question occurs, whether the case goes to the supreme court, or should be heard before a justice when not holding a term? Neither of the counsel expressed any preference, but submitted this question to the justice then holding the special term at Salem, and an order was made *pro forma* by the court, that should that be found to be the proper course, the appeal should be heard by the justice. The circuit judge, on these appeals, did not act as a court. (See *Hawley v. Donnelly*, 8 *Paige*, 416.) No decree could be made by him in the matter, while holding a vice chancellor's court, nor could any decree or order be entered by the clerk of that court. He could affirm or reverse, and award costs, but his order, unless an issue was ordered, was to be certified to the surrogate who enforced it. And the method of reviewing his decision was by a petition of appeal filed with the surrogate, to which the surrogate should have made a return. (*Gardner v. Gardner*, 5 *Paige*, 170. *Hawley v. Donnelly*, 8 *Id.* 416.) This matter, therefore, was pending before him as circuit judge, and not as vice chancellor. And it was not in any way in the court of chancery. Consequently, it was not transferred to the

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new supreme court by the constitution. Nor was it transferred by the judiciary act. The seventeenth section of that act gives an appeal from the decision of the surrogate, in such cases, after the 5th day of July, 1847, but does not in terms extend to appeals then pending before a circuit judge. In this respect the phraseology is clearly prospective. This was therefore a special proceeding pending before a circuit judge; and is provided for by the seventy-sixth section of that act, and could, by an order made on or before the 5th day of July last, have been transferred to any justice of the present supreme court. No such order having been made, it could be transferred by that court to one of its justices; as was done in this case. The terms of that section are general, and provide for transferring special proceedings to a county judge, as well as to a justice of the supreme court. But this jurisdiction, under the old system, was exclusively in the circuit judge; and the sixteenth section of the judiciary act, in the broadest and most comprehensive language, gives to the justices of the supreme court all the powers before possessed by circuit judges; and it cannot for a moment be supposed that the legislature, by the language of the seventy-sixth section, intended to confer jurisdiction in a case like this upon county judges. In case of an appeal from the decision of the justice, after the proceedings are remitted to the surrogate, (or other officer acting as such,) that appeal would be to the supreme court, as it was to the court of chancery before. And the supreme court, in place of the old court of chancery, has full power, by the constitution and the sixteenth section of the judiciary act. No doubt, if the cause should be taken to the supreme court, after the decision by a justice sitting for the circuit judge, a single justice would order it heard at a general term. (*Judiciary act*, § 20.)

This brings us to the main question. Was this instrument duly executed as a will? Four things, at least, are requisite for this purpose, which may be succinctly stated as follows: the testator's subscription at the end of the will; doing this in presence of each of the attesting witnesses, or acknowledging such subscription to them; publication, or declaring to them

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at the time of making or acknowledging subscription, that it is his last will and testament; and attestation by at least two witnesses, who sign their names as such at the end of the will, at his request. (2 R. S. 63, § 40. *Nelson, C. J. in Remsen v. Brinckerhoff*, 26 Wend. 325; S. C. 8 Paige, 489. *Chaffee v. Baptist Miss. Conv.* 10 Id. 86. *Rutherford v. Rutherford*, 1 Denio, 33.) The statute is silent as to the witnesses' signing in the presence of the testator. That was necessary here before the revision in 1830; and has been in England, certainly since 1677. (1 R. L. 364. 29 Car. 2, ch. 3.) But it is believed the requirements of the statute are merely cumulative, and that this is still necessary. The object of the old rule was to prevent imposition by changing the paper. And perhaps no instrument can be considered properly attested, unless the witnesses subscribe as such at the time of its execution or acknowledgment. (4 Taunt. 214. 2 Maule & Sel. 576. 2 Wend. 575.) This point, however, does not arise in this case; for the evidence is pretty clear, that the witnesses subscribed in the presence of the testator, and that no physical inability prevented him from seeing them do so. The difficulties in the case do not lie there.

The appellant insists that the proof before the surrogate was insufficient as respects nearly every requirement of the statute. On the other side it is contended that the proof was direct on all, and if not clear and conclusive, was sufficiently so to make a case by the aid of legal presumptions. As I have not been able to find this instrument duly executed, except by such aid, for the better understanding of the subject it may be useful briefly to advert to the former law, in relation to the proof of wills.

Before 1830, our statute was almost a literal transcript of the 5th section of the statute of frauds. That section requires that all wills of "land shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his direction, and shall be attested and subscribed in the presence of the deviser, by three or four credible witnesses." The recent English statute, passed in 1837, (2 Vict. ch. 26, § 9,) requires the will to be in writing, and "signed at the foot or end

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thereof by the testator, or by some other person in his presence and by his direction. And such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." And no other publication is required. Our statute is as follows: "1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." (2 R. S. 63, § 40.) A brief parallel of the two existing statutes may lead us to understand the changes effected by them. 1. By the provisions of both, the testator must sign at the end of the will. The only alteration by the English statute is, that the signature must be at the end of the will; whereas by the statute of frauds, writing his name any where in the will, or at the top or bottom, or in the margin, was sufficient. Indeed, at one time sealing was deemed a sufficient signature. (*Lemayne v. Stanly*, 3 Lev. 1. *Warneford v. Warneford*, 2 Strange, 764. *Lee v. Libb*, 1 Show. 78.) That was afterwards reconsidered. (*Ellis v. Smith*, 1 Ves. 11. *Wright v. Wakeford*, 17 Id. 458.) Lord Eldon, in the last case, said a seal was unnecessary. Sealing and delivery were sufficient for a deed, from the conquest until the statute of frauds; and it was very natural that this solemnity should be approved in making wills by the early decisions upon that statute. Even magna charta has no subscription by parties or witnesses. Nothing but the solitary seal of King John. (*Thompson's Essay on Magna Charta*, 100, 274, 325, 448. And see note to *Burling v. Paterson*, 9 Carr. & Payne, 570.) Our statute requires the testator to subscribe; the English statute

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only to *sign*, at the end. Perhaps there it may not now be necessary that he should actually *subscribe* the will. (See 2 *Curteis*, 324, *Woodington's will*.) The English statute allows another to sign for, and by the direction of the testator, in his presence. Ours, in terms, requires the testator to do it personally. (*But see* § 41, and *remarks of Walworth, Ch.*, 10 *Paige*, 91.) 2. The subscription of the testator in presence of the witnesses, or the acknowledgment thereof, is to be done in the same manner in both, except that there all the witnesses must be present at the same time, while here the old rule prevails, allowing the acknowledgment and attestation to be at different times. (1 *Phil. Ev.* 499. *Ellis v. Smith*, 1 *Ves. jun.* 11.) 3. Here the testator must declare it to be his last will and testament. There it is unnecessary. The great question of the necessity of publication is put at rest by both statutes. 4. There the attestation must be by at least two witnesses in the testator's presence, but the statute is silent as to a request. Here the statute requires the same number to sign at his request, but is silent as to his presence. The word "credible," in the qualification of witnesses, is omitted in both statutes. (See 1 *Phil. Ev.* 494; 2 *Cowen & Hill's Notes*, 1341, 2; 2 *Sugd. on Vend.* 253, 6th *Am. ed.*) These changes are important. It would seem that under the former law it was the opinion of many able judges that no publication was necessary. And not only so, but when it was proved that the testator wrote his name in any part of the will before attestation, and acknowledged the instrument to be his deed or act, knowing himself what it was, and the witnesses attested it in his presence, it was valid; although the testator did not declare it to be his will, nor did the witnesses see his signature nor have any intimation what the paper was; particularly if he wrote the will himself. (*White v. British Museum*, 6 *Bing.* 310. *Wright v. Wright*, 7 *Id.* 457. *Johnson v. Johnson*, 1 *Cr. & Mees.* 146. And see *Matthews on Ex'rs*, 50; 3 *Stark. Ev.* 1689; *Walworth, Ch.*, in *Brinckerhoff v. Remsen*, 8 *Paige*, 488; *Gibbs, C. J.*, 7 *Taunt.* 361, *sed quære*; *Wright v. Wakeford*, 17 *Ves. jun.* 458, 9; *Doe v. Burditt*, 4 *Adol. & Ellis*, 1.)

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The following is perhaps a pretty correct summary of the requirements of our statute. The testator must subscribe his name at the end of the will, which may be by his autograph, or by his mark, or if he is unable to write, by another in his presence and by his express direction. This subscription must be made in the presence of the attesting witnesses, or the making of such subscription must be acknowledged to them. If by acknowledgment, that may be made to the witnesses separately, or he may subscribe and publish in the presence of one, and acknowledge, &c. before another. When he subscribes or acknowledges he must declare the instrument to be his last will and testament. And there must be at least two attesting witnesses; each of whom must sign as a witness at the end of the will, at the request of the testator, and at the time of the subscription or acknowledgment thereof and publication by the testator.

If this view of the statute is correct, the question is, Was this instrument executed in compliance with its provisions? Before the surrogate an objection was taken to the admissibility of the witness Thomas. But the rule is well settled, that if the subscribing witnesses fail to prove the instrument, others may be called. (1 *Phil. Ev.* 502. 4 *Wend.* 277. 7 *Taunt.* 251. *Lowe v. Joliffe*, 1 *Black. Rep.* 365. 3 *Stark. Ev.* 1692, and cases there cited.) Though the proof in such cases should be very clear. (*Cowen & Hill's Notes*, 1356.)

None of the witnesses in this case pretend to have heard the decedent acknowledge his signature. Brownell has no recollection of seeing him write. Beadle thinks he saw him sign the will, but is not certain. Thomas was not certain he saw him sign it. He is certain he did sign it, but cannot say, independently of the attestation clause, whether he signed it in the presence of the witnesses. No evidence of the hand-writing of the testator has been offered. This is in substance all the proof there is of the subscription or acknowledgment of the same by the testator. The proof of publication is pretty clear. Beadle thinks the testator declared it to be his will, and Thomas swears to it positively. There is no doubt but that Beadle and Brow-

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nell signed it as witnesses. And I think, in ordinary cases, a request may be presumed, where two persons are called in to witness a paper, which they do, in the presence of the testator, he at the same time subscribing it and declaring that it is his last will and testament. There is a purpose and entirety in the transaction that favors a pretty liberal intendment as to his wishes. No particular form of words is required, to comply with the statute. If the testator knows what is necessary, and does it, he may use his own language. (*Per Nelson, C. J. 26 Wend. 332.*) But the statute must be substantially complied with, regardless of consequences. No part of it can be omitted, and the sooner these changes are understood, the sooner certainty and quiet will prevail on this important branch of our jurisprudence.

The principal difficulties in this case arise upon the testator's subscription, and particularly his subscription in the presence of the witnesses. It would seem from some of the old cases, that much may be presumed from the declaration that it was the testator's will. Thus in *Lemayne v. Stanly*, (3 *Lev. 1.*) it does not appear that the attestation was by the request of the testator, or that the witnesses saw him write any part of the will, or that he acknowledged to them that he wrote his name. This was the first case under the statute of frauds, and a special verdict found that Sir John Stanly wrote his will all with his proper hand, and commenced "In the name of God, Amen. I, John Stanly, make this my last will and testament." And by this he devised the lands in question, but did not subscribe his name to it, merely affixing his seal, and this was subscribed by three witnesses in his presence. (*But see the observations of Ld. Hardwicke, in Gray v. Atkinson, v. Ves. 454; and of Ld. Eldon in Morrison v. Turnour, 2 Ves. 183.*) So, too, the case of *Ellis v. Smith*, (1 *Ves. jun. 11.*) decided by four most eminent men, seems to imply that publication alone was sufficient evidence of signing. That, however, was at least doubtful, even under the statute of frauds. Be that as it may, our statute is too explicit in its terms to allow any such presumption. The testator must subscribe the will, and do this, or acknowledge it,

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in presence of the witnesses. And though he has subscribed it, if not in presence of the witnesses, publication is not a sufficient acknowledgment. (*Chaffee v. Bap. Miss. Conv.* 10 *Paige*, 85.) There is no evidence of any acknowledgment of the testator's signature in this case, except the publication. The case then rests upon the evidence of his signing in the presence of witnesses. If this is proved, his signature is proved. If he did not do this, it is of no consequence whether his signature is proved or not, for his omission to sign or acknowledge in the presence of, or to, the witnesses, is fatal. (*Per Nelson, C. J.*, 26 *Wend.* 331.) On this point the testimony of Brownell affords no direct evidence. He remembers nothing about it. Beadle thinks it was done, but cannot be certain. He is not certain that the testator and Thomas were both in the room when it was witnessed, but thinks they were. Indeed, he is not certain whether it was the testator or Thomas, that requested the witnesses to attest the will; or which of them declared it to be his last will and testament. Thomas, at first, could not remember whether the testator signed it before or after the witnesses were called into the room to witness it; and finally he does not recollect whether he saw him sign it at all. Nor can he recollect, independent of the writing, whether he signed the will in their presence or not. By the "writing," I understand the witness to mean the attestation clause. After a careful perusal of the testimony of this witness, I have come to the conclusion that his evidence on this branch of the case, depends entirely upon the use he may make of the attestation clause as a memorandum. The rule is well settled that the witness may use his memorandum to refresh his recollection. But it is not evidence to go to the jury, even though he swears he thinks it correct. He may refresh his memory, and then, if his recollection recalls the transaction, that recollection is testimony to go to the jury. He must be conscious of the reality of the matters he swears to, at the time he testifies; and it is not sufficient that his mind recurs to the memorandum, and he himself believes that true. A contrary doctrine would introduce a new species of written evidence, in the creation and production of which, the parties

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to be affected had no part. And it would effectually preclude all inquiry into the circumstances of the transaction, except what a witness, perhaps casually present, might think it convenient or important to note. The courts of South Carolina have perhaps gone a little farther. (*State v. Rawls*, 2 *Nott & McCord*, 331. And see *Cowen & Hill's Notes*, 750.) But in this state, and in England, this rule of evidence, it is believed, remains unshaken. (1 *Phil. Ev.* 289, and cases there cited. 1 *Stark. Ev.* 129. *Cowen & Hill's Notes*, 551, 2, 750. *Feeter v. Heath*, 11 *Wend.* 477.) There is a class of cases where the memorandum itself may be good secondary evidence, as original entries made in the usual course of business, and where the witness swears he made them, and intended to make them correctly, and believes them true. (*Merrill v. Ithaca and Owego R. R. Co.*, 16 *Wend.* 586. *Van Dyne v. Thayre*, 19 *Id.* 162. *Bank of Monroe v. Culver*, 2 *Hill*, 531.) But this does not extend to memoranda made by a witness for his own convenience, and for the mere purpose of aiding his recollection. (*Lawrence v. Butler*, 5 *Wend.* 301.) In such cases the general rule obtains. Perhaps the case of *Van Dyne v. Thayre* carried the principle to the utmost bounds. But that was a strong case. There the witness' business was to make the inventory, and he swore he made it from papers before him. But were the rule otherwise, it is difficult to see how the attestation clause in this case could be used as a memorandum to refresh the memory of the scrivener who drew the will, as to the facts of its execution. The weight of evidence I think is, that this clause, and indeed the whole will were drawn before the witnesses were called into the room. If so, as to him, it was a memorandum of what was to be done, and not of facts that had already transpired. Had this been drawn by a lawyer who was accustomed to draw wills, and whose duty it was to see that every thing necessary was done, and he had sworn that every thing was intended to be done as stated in the attestation clause, another question would have arisen, and perhaps a certain intendment might have obtained. The evidence of Thomas, therefore, does not

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establish the fact that the testator signed in the presence of the witnesses.

We are thus thrown back upon the testimony of the attesting witnesses. Beadle states his belief, but in truth goes no farther. Of course the onus is upon the respondent. The mere unsupported belief of a witness is not evidence. It has been said, a witness may pretend to testify to his belief, and be convicted of perjury therefor. (2 *Russ. on Crimes*, 597.) But this is where it is proved he swore to a belief contrary to his knowledge; or where the witness was deemed to have used this language as a mere mode of expression, and as an absolute term. In this sense, no doubt, Todd, Justice, used it in *Riggs v. Tayloe*, (9 *Wheat.* 483.) It is very different where the witness honestly believes a fact to exist, but says he cannot be certain, and is not positive and cannot remember, but thinks it so. No one would suppose a note proved by a witness who stated that he did not know the party's hand-writing, but had an impression and belief that it was his signature. This would not be evidence. And yet belief as to hand-writing, identity of persons &c. is admissible, where founded upon sufficient knowledge. In *Riggs v. Tayloe*, the party swore that it was his impression that he had torn up the paper. He was not certain, but such was his impression; and if not, he had lost it and had made search and could not find it. It was not material whether it was destroyed or lost: either (in that particular case) would let in secondary evidence. Had there been no evidence of a search, the sufficiency of the party's impression and belief would have been passed upon. Belief, to be admissible, must rest upon sufficient and legal foundation. No belief, however confident, will do, without recollection. (*Cutter v. Carpenter*, 1 *Cowen*, 81. *Brown v. Cady*, 19 *Wend.* 477. 1 *Stark. Ev.* 127. 23 *Wend.* 425. 9 *Cranch* 388. 1 *John.* 97. 1 *Phil. Ev.* 290.) Belief alone is not sufficient for the judge, even. As remarked by Lord Eldon, after he had been 25 years chancellor, "individual belief ought not to govern a case; it must be judicial persuasion."

The only remaining question is, whether in this case the
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presumption of law upon all the testimony, will sustain the execution of this instrument as a will?

The will had been published, if at all, about ten years before the hearing. One of the subscribing witnesses has nearly forgotten the whole transaction, and the other is almost as much lost on many important points. Where the witnesses are dead, or from lapse of time, do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence then existing, if there are no circumstances of suspicion, presumes the instrument properly executed. (*Mathews' Pres. Ev.* 35, 39, 260. 1 *Phil. Ev.* 501, 503. *Cowen & Hill's Notes*, 1303. *Burrows v. Lock*, 10 *Ves.* 470, n. a, *Sumner's ed.* *McQueen v. Farquhar*, 11 *Id.* 467. *James v. Parnell*, 1 *Turner & Russ.* 417. *Doe v. Burditt*, 4 *Adol. & Ellis*, 1. *Hall v. Luther*, 13 *Wend.* 491. *Woodworth, J. in Dan v. Brown*, 4 *Cowen*, 489. *Walworth, Ch. in Brinckerhoff v. Remsen*, 8 *Paige*, 501. *Nelson, Ch. J. in S. C.* 26 *Wend.* 332. *Spencer, C. J. in Jackson v. Le Grange*, 19 *John.* 383. *Hare's will*, 3 *Curteis*, 54.) Particularly where the attestation clause is full. (*Chaffee v. Bap. Miss. Conv.* 10 *Paige*, 90.) That rule applies to this case, and constrains me, though with much doubt and hesitation, to sustain the will. The force of this legal presumption would, in my view, be greatly lessened, were it clearly proved that the attestation clause was not read to the witnesses. But even then, we are to intend (unless shown to be otherwise) that the witnesses understood what they were signing, and perhaps if they did not read that clause, after the lapse of ten years, if the witnesses do not remember the manner of execution, the maxim *omnia præsumentur recte et solemniter esse acta* applies. Considering the age of the decedent, who had passed the ordinary limit of man's existence, the limited acquaintance the witnesses had with him and his hand-writing, the almost negative character of some part of the testimony of the subscribing witnesses, and their imperfect memory, I should have been much better satisfied if a jury had passed upon the case. But old age alone is not sufficient ground to presume imposition; and I have not discovered any evidence of fraud

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or undue influence in this case, or circumstances to awaken suspicion. (See *Lewis v. Read*, 1 Ves. 19, per *Buller, J.*; *Whelan v. Whelan*, 3 Cowen, 537, *Griffith v. Robbins*, 3 *Mad. Rep.* 191; *Lord Brougham in Hunter v. Atkin*, 1 *Coop. Sel. Cas.* 464; *Odell v. Buck*, 21 *Wend.* 142; 22 *Id.* 526; *Story's Eq.* §§ 236, 7; *Durling v. Loveland*, 2 *Curteis*, 225; *Chambers v. Queen's Proctor*, *Id.* 415; *Ingram v. Wyatt*, 1 *Hagg.* 384.)

I have somewhat extended my remarks in the examination of this case, not only that the parties may understand my views, but because, upon the argument, every provision of the statute was fully pressed upon my consideration.

The proceedings are affirmed.

MONROE SPECIAL TERM, September, 1847. Welles, Justice.

Gunn vs. Blair and Gunn.

An amendment of an injunction bill will not be permitted unless a sufficient reason is shown why the matters stated in the proposed amendments were not inserted in the original bill; nor unless the proposed amendments are verified by oath, as the bill is required to be verified.

An affidavit of the complainant stating that she is advised by counsel, and verily believes it to be true, that it is important and necessary, in order to protect her rights fully, and to enable the court to do justice in the premises, that her bill should be amended as proposed, is not a sufficient verification of the amendments.

IN EQUITY. Motion for leave to amend bill of complaint. The bill in this case was filed about the 3d day of June, 1844, before the vice chancellor of the eighth circuit, upon which an *injunction* and a *ne exeat* were issued against the defendant Blair; both of which were served upon him. He gave the requisite security on the *ne exeat*, and soon after removed from this state to the territory of Wisconsin, where he now resides. The bill did not show that the defendants, or either of them, at

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the time of the commencement of the suit, resided within the eighth circuit; and no fact was stated in the bill which could give the vice chancellor of that circuit original jurisdiction of the subject matter. The defendant Blair put in his answer in August, 1844. The plaintiff put in her replication in September, 1844, and an order to produce witnesses was entered by the solicitor for Blair, and served in July, 1845. No steps had been taken in the cause by either party, since July, 1845, with a view to expedite its progress. The defendant Gunn had suffered the bill to be taken as confessed against him. The plaintiff now moved to amend the bill, by striking out about fifteen folios thereof and inserting about seventeen folios of new matter, materially changing the case, and which would probably require a new or further answer. The proposed amendments contained statements which it was contended would, if allowed and inserted in the bill, show a case over which the vice chancellor would have jurisdiction.

H. R. Selden, for the plaintiff.

George Willson, 2d, for the defendant Blair.

WELLES, J. The delay in the progress of the suit, and in making this application, is accounted for by the plaintiff upon the ground of negotiations between the parties for a settlement, which were not put an end to until August last. It would seem, from the affidavits read, that both parties were willing to avoid a protracted and expensive litigation of the matters involved; and with that view, several attempts for a settlement were made. The counsel for the defendant Blair, swears that in June, 1847, he (Blair) and his counsel had an interview, at Canandaigua, with the counsel for the plaintiff, and her husband, which resulted in a failure to settle. If the defendant was anxious to speed the cause, it was in his power to do so equally with the plaintiff. I shall therefore regard the motion to amend, the same as if made at the first opportunity,

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after the order to produce witnesses was served on the plaintiff's solicitor.

There are, however, insuperable difficulties upon these papers in the way of granting this motion. 1. No reason is shown why the matters stated in the proposed amendments were not inserted in the original bill. The plaintiff does not state her ignorance of their existence at the time the bill was filed, or that they have come to her knowledge since. If she knew of them, they should have been inserted, or a reasonable excuse shown now, for the omission. As this was an injunction bill, the objection is fatal to the present motion. (*Rodgers v. Rodgers*, 1 *Paige's Rep.* 424. *Whitmarsh v. Campbell*, 2 *Id.* 67. *Verplank v. Mercantile Ins. Co. of N. Y.*, 1 *Edw. Ch. Rep.* 46.) 2. By rule 43 of the court of chancery, providing for amendments to bills, it is declared: "He (the complainant) may also amend sworn bills, except injunction bills, in the same manner, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill; *such amendments being verified by oath, as the bill is required to be verified.*" The same provision is retained in the 34th rule of this court. I am not aware that this requirement has ever been dispensed with in practice, in cases of sworn bills. (*See the cases last cited.*) The amendments proposed in this case are not sworn to, or otherwise verified. The nearest any thing in the papers comes to it, is the following clause in the plaintiff's affidavit: "This deponent further saith, that she is advised by her counsel, and verily believes it to be true, that it is important and necessary, in order to protect her rights fully, and enable the court to do justice in the premises, that her said bill of complaint should be amended in several particulars, as follows." The affidavit then proceeds with the matters proposed to be inserted by way of amendment.

This falls very far short of verifying the amendments, by oath, as the bill is required to be verified. The motion to amend is, therefore, denied, with \$10 costs, but without prejudice, &c.

WASHINGTON SPECIAL TERM, October, 1847.

Paige, Justice.

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THE BANK OF LANSINGBURGH *vs.* CRARY and others.

COGGILL and others *vs.* CRARY and another.

REID *vs.* CRARY.

SMITH *vs.* CRARY and others.

FITCH *vs.* CRARY.

Growing trees, fruit, and grass, being parcel of the land, are within the statute of frauds; and until severed from the land, either actually or in contemplation of law, they cannot be conveyed, or contracted to be conveyed, by parol, nor taken in execution as chattels.

The defendant in an execution cannot, by parol, authorize the levy of the execution upon growing trees, fruit or grass growing on his land, before severance. And if he, by parol, turns out such growing trees, fruit or grass to the sheriff, on the execution, and the sheriff, by virtue of such authority, levies on the same, the levy will be void.

If a sheriff, after making a levy on an execution in his hands, receives other executions against the same defendant, the receiving of such executions operates as a constructive levy under them on the property levied upon under the first execution.

Whether a chattel mortgage can be given on growing trees, fruit or grass, while parcels of the real estate; and whether such mortgage can be given on the produce of real estate not in actual existence at the time of the execution of the mortgage?

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Growing trees or grass may be severed, in law, from the land, and become personal property without an actual severance; as where the owner in fee of the land, by a valid conveyance in writing, sells the trees or grass to a third person; or where he sells the land, reserving the trees or grass.

A mortgage of growing trees or grass, given by the owner in fee of the land of which they are parcel, does not work a severance in law of the trees or grass from the land, until the mortgage becomes absolute by the non-performance of the conditions of the mortgage.

Until a chattel mortgage becomes absolute, by the non-performance of the conditions of the mortgage, the mortgagor has such an interest in the chattels mortgaged, as is liable to levy and sale on execution; and the purchaser at the sale on execution takes the property subject to the mortgage, and acquires with it the right to redeem it by the payment of the amount due on the mortgage.

EXECUTIONS were issued on the judgments recovered in the above suits, to the sheriff of the county of Washington. The execution, in the cause first above mentioned, was received by

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the sheriff on the 14th of April, 1847. The executions, in the other causes, were received by the sheriff at the following times, viz.: in the cause secondly above mentioned, on the 28th of April, 1847; in the cause thirdly above mentioned, on the 18th of June, 1847; in the cause fourthly above mentioned, on the 21st of June, 1847; in the cause fifthly above mentioned, on the 28th of July, 1847. The defendant John Crary gave John Savage a chattel mortgage, on several articles of personal property, dated October 26, 1846, to secure the payment of \$355.49, on the 26th of October, 1847. Crary also gave, to John Savage, another chattel mortgage, on other articles of personal property, dated April 20, 1847, to secure the payment of \$2000 within one year from the date; and also a further chattel mortgage, dated May 11, 1847, to secure the payment, on the 1st of December, 1847, of \$300, and of his previous indebtedness to John Savage. This last chattel mortgage was given by Crary on various articles of personal property, and also upon all the produce of his real estate; consisting of 150 acres of meadow, and of growing crops of corn, oats, rye, &c. These chattel mortgages were duly filed, in the office of the town clerk. The sheriff of Washington county, on the 18th of May, 1847, called on the defendant Crary, with the execution in the first above entitled cause, and Crary turned out to him, on such execution, the property specified in the mortgages; and the sheriff then levied thereon. The sheriff, on receiving the execution, in the suit fifthly above mentioned, was requested, by the attorney of Fitch, to levy on the hay, on the defendant's real estate, then cut, amounting to ninety-nine tons; being the meadow or grass aforesaid levied on under the first execution. The Fitch execution was at this time the only execution in life in the sheriff's hands. The sheriff inventoried the hay, the produce of said real estate, at ninety-nine tons. It is admitted by the parties, that if such hay was not levied upon, under the first execution, it was levied upon, by taking such inventory, at the time last mentioned. The sheriff, between the 12th and 16th days of October, 1847, sold, under the said executions, all the property levied upon by him, including the hay, for about \$2400. The

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hay sold for about \$300. There was due at the time of the sale, on the mortgages of Judge Savage, about the sum of \$732. The proceeds of the sale, exclusive of the hay, were more than sufficient to satisfy the mortgages and the first judgment.

On this state of facts, the following questions were submitted by the parties for decision, viz. :

1. Whether the levy by the sheriff, on the 18th of May, on the meadow, then being grass growing, turned out by Crary on the first execution, was valid and operative as against the actual levy on the hay, being the grass aforesaid cut, made under the Fitch execution. 2. Whether the proceeds of the sale of such hay should be applied on the Reid execution, or on the Fitch execution. Or, 3. Whether the mortgagee had the right to apply the proceeds of the hay in payment of his mortgage.

A. L. McDougall, for Josephus Fitch and H. Coghill, &c.

James Gibson, for Thomas Reid and John Savage.

PAIGE, J. The facts of this case present the question, whether grass, growing on land, can be levied upon as a chattel, under an execution against the owner of the land, when it is turned out on the execution by the defendant, or when such levy is made by and with the parol consent of such defendant.

A distinction exists between growing crops of grain and vegetables, such as wheat, corn and potatoes, the annual produce of labor and of the cultivation of the earth, and growing trees, fruit and grass, the natural produce of the earth, which grow spontaneously and without cultivation. The former are chattels; they go to the executor, and may be taken in execution as chattels. (*Evans v. Roberts*, *Bayley, J. Littledale, J. 5 Barn. & Cress.* 829.) But growing trees, fruit and grass, are parcel of the land, and descend with it to the heir; and cannot be seized as chattels, under an execution, until severed from the land. (*Toll. Law of Ex'rs*, 192, 3, 4. 3 *Bac. Abr.* 64. 2 *Black. Com.* 122, 3. *Evans v. Roberts*, 5 *Barn. &*

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Cress. 829. *Tidd's Pr.* 913, 911. 2 *John.* 418. 9 *Cowen*, 39. *Jones v. Flint*, 10 *Adol. & Ellis*, 753.)

Growing trees, fruit and grass, being parcel of the land, are within the statute of frauds, and cannot be sold or conveyed by parol. This question was carefully examined and deliberately settled, in the recent case of *Green v. Armstrong*, (1 *Denio*, 550.) In that case, it was decided, that an agreement, for the sale of growing trees, was a contract for the sale of an interest in lands, and to be valid, must be in writing. And it was there held, that the same rule applied to growing fruit or grass, and to all other natural products of the earth, which grow spontaneously, without yearly cultivation. The same principle was held in *Crosby v. Wadsworth*, (6 *East*, 602;) *Evans v. Roberts*, (5 *Barn. & Cress.* 829;) *Jones v. Flint*, (10 *Ad. & Ellis*, 753;) *Teal v. Auty*, (2 *Brod. & Bing.* 99.)

Upon the principle of these cases, growing grass is a part of the land, and cannot be transferred by parol; nor can a valid contract for the sale of it be made, unless the contract be in writing. The revised statutes (statute of frauds) declare, that "no interest in lands" shall be created, unless by deed of conveyance in writing; and that every contract for the sale of "any interest in lands," shall be void, unless the contract be in writing. (2 *R. S.* 134, §§ 6, 8.) Growing grass is an interest in lands, and so long as it remains annexed to the land, and is neither actually, nor in contemplation of law, severed therefrom, it cannot be sold or transferred by parol; nor can any valid agreement for the sale of it be made, unless the agreement be in writing. The growing grass, in this case, on the 18th of May, when it was turned out by Crary on the first execution, was a part of the land owned by him; and was therefore an interest in land, and could not be transferred by him to the sheriff, by parol; nor could Crary, then, by parol, make any valid agreement with the sheriff, authorizing him to seize and sell the same, on the execution in his hands. Crary's turning out the grass to the sheriff, on the execution, was a mere nullity. It transferred to the sheriff no right, and conferred on him no authority to levy on the same, under the execution. And the

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sheriff, without some such right or authority, derived from the defendant Crary, had no power to levy on the growing grass; it being real property, by virtue of his execution, as a chattel. The sheriff's levy, therefore, upon this grass, on the 18th of May, was a nullity, and totally inoperative as against the subsequent levy made upon it under the Fitch execution, after it had been actually severed from the land.

There does not appear to have been any actual levy made by virtue of the executions in the Coggill and Reid suits, on the property levied upon under the first execution. But the receiving of these executions, by the sheriff, after his levy on the first execution, was a constructive levy of such executions, on the property levied upon, under the first execution. (5 *Coven*, 390. 1 *Hill*, 559. 17 *John*. 116. 11 *Wend*. 548.) But as the levy under the first execution upon the growing grass was a nullity, there was no valid levy of the second and third executions on such grass. No part of the proceeds of the sale of the hay can therefore be applied, on these executions. Independent of the mortgages, therefore, I am prepared to say, that, in my judgment, the whole proceeds of the sale of the hay should be applied on the Fitch execution.

The question, whether the mortgagee has the right to apply the proceeds of the hay, in payment of his third mortgage, in exoneration of the proceeds of the sale of the other personal property, included in such mortgage, in order to allow the last mentioned proceeds to be applied on the Coggill and Reid executions, remains to be considered.

It appears that the whole sum due on the mortgages of Judge Savage, at the time of the sale, was \$732; that the amount of the sales of the personal property included in the mortgages, exclusive of the hay, was \$2100; which, after satisfying all the mortgages, would leave \$1368 to be applied on the executions. The statement of facts, agreed upon by the parties, does not mention the amount of the sales of the property included in the third mortgage, exclusive of the hay; nor whether any of the grass, intended to be mortgaged, was in actual existence, at the date of the third mortgage. I think, however, I have a right

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to infer, that the sales of the property included in the third mortgage, exclusive of the hay, were sufficient, or more than sufficient, to satisfy such mortgage.

Conceding that a valid chattel mortgage, being in writing, can be given upon parcels of real estate, such as growing trees and grass, and waiving the consideration of the question, whether a chattel mortgage can be given, upon produce of land, not in actual existence at the time of the execution of the mortgage, I will proceed to consider what effect the third mortgage has, upon the question of severance in law from the land, of the growing grass intended to be mortgaged, so as to change it from real to personal property, and thereby to make it a subject of levy, under the first execution, as a chattel.

Growing trees or grass may be severed in law from the land, and become personal property, without an actual severance; as where the owner of the fee in the land, by a valid deed, or conveyance in writing, sells the trees or grass to a third person; or where he sells the land, reserving the timber, trees or grass. In both these cases, the timber and trees become chattels distinct from the soil, and go to the executor. For in contemplation of law they are abstracted from the earth. (*Toll. Law of Ex'rs*, 194. 3 *Bac. Abr.* 64.) And whenever property goes to the executor, as a chattel, it can be taken and sold, on an execution, as a chattel. (*Evans v. Roberts*, 5 *Barn. & Cress.* 829, *Bayley, J. Littledale, J.*)

In this case, the mortgage, at the time of the levies and sales, had not become absolute, by the failure of the mortgagor to perform the condition of the mortgage. The mortgage money did not become due, until the 1st of December, 1847. At the time of both levies, as well as of the sale, Crary was the owner of the fee of the land, and also the legal owner of the growing grass, and had the right of possession of the grass, and an interest therein, until its forfeiture by his non-performance of the condition of the mortgage. (7 *Wend.* 135. 17 *Id.* 53. 10 *Id.* 320. 8 *Id.* 339.) The ownership of the grass and of the land thus both continued in Crary, and were not separated. The grass was not therefore, by the mortgage, severed in law from

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the freehold, and converted into personalty. Whenever the right to growing trees or grass and the fee of the land are in the same person, the trees and grass are parcel of the inheritance, and are real property. And this is so, even where they have been separated by a sale, but have subsequently become reunited, in the same person. (*Toller's Law of Executors*, 195.) So, if the owner of the trees or grass is only owner of the reversion in the land, after an estate for years or life, the trees or grass are parcel of the inheritance, so long as they are annexed to the land, and they descend with it to the heir. (*Idem*, 195.)

After the forfeiture of the condition of the mortgage, as the mortgagee would, by the failure of the mortgagor to perform such condition, have acquired, by the mortgage, an absolute title to the mortgaged property, there would undoubtedly have been a severance, in contemplation of law, of the grass from the land, and it would have then become personal property—the personal property, however, of the mortgagee; not of the mortgagor. (9 *Wend.* 80. 1 *Hill*, 473. 7 *Cowen*, 290. 8 *John.* 76. *Brown v. Bement*, 12 *Wend.* 61. *Toller*, 194.)

Has the mortgagee the right to apply the proceeds of the hay, in payment of his third mortgage, in exoneration of the proceeds of the sale of the other personal property included in that mortgage; or has Reid any legal or equitable right to have such application made, to the end that the proceeds of the other property may be applied on his execution? It seems to me, that, inasmuch as the proceeds of the sale of the other property on the executions were sufficient to satisfy the third mortgage, (which fact I have assumed) the mortgagee has no interest in this question; he having been fully paid out of the other property, or there being sufficient of such property to pay him, without touching the proceeds of the hay. The application of the proceeds of the hay is therefore a question which alone affects Reid or Coghill, and Fitch. From what has already been said, it appears that Reid has no lien on the proceeds of the hay, his levy on the same, when in the condition of growing grass, being invalid. Fitch's execution is the only one

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which was legally levied on this property, and if the mortgage was out of the way, there could be no doubt as to his right to have the entire proceeds applied on his execution. And as between the mortgagee and him, without reference to the rights of Reid or Coggill, Fitch could compel the application of the proceeds of the other property included in the third mortgage, in payment of such mortgage, so as to leave the proceeds of the hay to be wholly applied on his execution. This right of Fitch is founded upon the well settled principle of equity, that, where one creditor has a right to go upon two funds, and a second creditor upon one of them, belonging to the same debtor, the former may be compelled to apply first to the fund not reached by the second creditor, so that both may be paid. (4 *John. Ch. Rep.* 17. 17 *Ves.* 520. 1 *Paige*, 185. 19 *John.* 486. 7 *John. Ch. Rep.* 183.) Doubtless the same rule would apply to Reid and the mortgagee, if the rights of Fitch were not involved.

I am now considering the question upon the assumption that the mortgagee has the application of the moneys produced by the sales on the executions; and that the moneys are deemed to be in his hands, or in the hands of the sheriff, as his agent. This seems to be assumed by the parties, in the terms of the question submitted by them, for decision. But, it appears to me, that the mortgagee can, under no circumstances, have any control over the moneys in the hands of the sheriff, nor any direction of their application, any farther than to require, that his mortgage debts be paid out of some of the portions of the mortgaged property. If the mortgaged property, which was levied upon, had been sold in the ordinary manner, and which, perhaps, was the only way in which it could have been regularly sold; that is, subject to the incumbrance of the mortgages; the purchaser would have acquired the title to the property subject to these mortgages, and the mortgagee would have had no interest whatever in the moneys produced by the sale under the executions. His remedy in that case, when his mortgage debts became due, would have been against the property in the hands of the purchaser, under the executions—a remedy to take and sell the property. Here the mortgaged

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property not being forfeited by the non-payment of the mortgage debts, such debts not falling due until after the sale under the executions, Crary, the mortgagor, had at the time of the sale a right to the possession, and the absolute ownership of such property, subject to the mortgages; which was such an interest as was liable to be sold on execution; and the purchaser, at the execution sale, if the sale was in the ordinary manner, acquired this interest, and took the property subject to the incumbrance, and with it, acquired the right to redeem the same, by payment of the amount due on the mortgages. (*Bailey v. Burton*, 8 Wend. 339, on appeal. *Otis v. Wood*, 3 Id. 498. 17 Id. 53. 10 Id. 320. 7 Id. 135.)

If the mortgaged property had been sold under the executions, subject to the mortgages, as real property which is subject to mortgages is sold on execution, no question could have been raised, in this case, as to the right of Fitch to the application of the whole proceeds of the hay on his execution. The property subject to the levy of the three first executions would have been sold by the sheriff, under those executions, or under all the executions, if the levy of all extended to it; and the proceeds would have been applied on such executions, according to the priorities of their respective levies. And the hay would have been sold only on the Fitch execution, as that execution was the only one which was levied on it, and consequently the whole proceeds of the hay must have been applied on that execution. And, neither in law or equity, would the plaintiffs, in the other executions, have had any right to the application of any part of such proceeds on their executions. And, if the mortgaged property was in fact sold by the sheriff under the executions, in pursuance of some agreement or arrangement entered into between all the parties interested, that he should, out of the proceeds of the sale, first pay the amounts due on the mortgages, and then should apply the balance on the executions, according to the priorities of their respective liens on the property, I think such agreement or arrangement ought not to deprive Fitch of any rights which he would have possessed had the sale been conducted in the usual and regular manner. The

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statement of the facts submitted is silent as to any such agreement or arrangement; and, in the absence of any evidence on the subject, it may properly be inferred that there was no such agreement or arrangement, and that the sheriff proceeded to sell, and did sell, the mortgagor's interest in the mortgaged property, subject to the incumbrance of the mortgage. The mortgaged property was sold under the executions, and not under the mortgages, and only the interest of the mortgagor was or could have been sold under such executions. The sale could not affect or impair the rights of the mortgagee. His mortgages, notwithstanding the sale, remained liens on the property, and would continue liens on the property in the hands of the purchaser, at the execution sales. The proceeds of the sale go into the hands of the sheriff to be applied by him on the executions, according to the priorities of their liens. The mortgagee can therefore have no right to direct what moneys, produced by the sale in this case, should be applied in payment of his mortgages, he not being legally entitled to any part of these moneys.

If no levy had been made upon the hay, under the Fitch execution, the hay could not have been sold, and of course no moneys arising from its sale could have been applied on any of the executions.

I have not deemed it necessary, for the decision of this motion, to inquire whether a chattel mortgage can be given upon produce of land, not in actual existence, at the time of the execution of the mortgage, and in connection with that question, to ascertain whether the vegetation of the meadow land, included in the third mortgage, had started on the 11th of May, when that mortgage was executed, so as to furnish any growing grass, in actual existence, upon which the mortgage could operate. I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop

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of grass or grain, one, two, or three years previous to its production. (*Waddington v. Bristow*, 2 Bos. & Pul. 462. *Evans* 4, 52 v. *Roberts*, 5 Bar. & Cress. 829.)

A rule or order must be entered, directing the sheriff of the county of Washington to apply the money arising from the sale of the hay in question on the execution in favor of Josephus Fitch against John Crary.

ST. LAWRENCE GENERAL TERM, October, 1847. *Cady*,
Paige, Willard and Hand, Justices.

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Where a creditor applied to a justice of the peace for an attachment against his debtor, and made an affidavit, which stated, that the debtor was indebted to him in the sum of \$16, arising on contract, over and above all discounts; that the debtor had told him that he was going to leave the county, and go to Canada, and, as the creditor believed, with an intent to defraud his creditors, and that he was about to take with him all his property; *Held*, that the affidavit was sufficient to authorize the issuing of an attachment.

An affidavit is sufficient to authorize an attachment, although the creditor merely swears to his belief as to the intent of the debtor to defraud his creditors, if he states positively the facts and circumstances on which such belief is founded.

Although an attachment is founded on a defective affidavit, if it is regular and legal on its face, and apparently within the jurisdiction of the justice, it will be a complete justification to the officer who executes it.

If the objection, that a joint plea of justification, in which an officer and a co-defendant united in a justice's court, failed as to the officer, in consequence of its having failed as a defence as to the co-defendant, was not taken before the justice, it cannot be taken on certiorari.

Justices' courts possess the same powers, as to amendments, as courts of record.

Justices are required to allow amendments, especially in all cases where the rights and interests of the adverse party will not thereby be put in jeopardy.

ERROR to the St. Lawrence common pleas. Heaton declared before the justice, against Fulton and one Whitney, in trespass, for taking and carrying away certain clothing, &c. The de-

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defendants pleaded the general issue, and a justification under an attachment, issued by Cummings, a justice of the peace, against Heaton, in favor of Fulton. Heaton proved that in September, 1845, Fulton and Whitney took a coat, &c. of Heaton. Whitney told Heaton he had an attachment against him. Cummings, the justice, produced his docket and papers to be read in evidence, and produced an affidavit of Fulton, entitled St. Lawrence county, which stated, "that Heaton, of Lisbon, in said county, was indebted to him in the sum of sixteen dollars, arising on contract, over and above all discounts; that he had often demanded the pay of Heaton, and he had refused to pay said demand, and Heaton told him, and one Northrup, that he was going to leave the county and go to Canada, and that he, Fulton, believed, with an intent to defraud his creditors, and was about to take with him all the property and effects he had." This affidavit was objected to by Heaton, as insufficient to justify the issuing of an attachment; and the justice sustained the objection, and rejected the attachment and proceedings founded thereon, as evidence, on account of the insufficiency of the affidavit, notwithstanding Fulton and Whitney offered to read them in evidence, with the docket of the justice, as a full justification of the trespass. The justice rendered a judgment against both Fulton and Whitney. The common pleas, on certiorari, affirmed the judgment of the justice, as to Fulton, but reversed it, as to Whitney.

T. V. Russell, for the plaintiff in error.

Geo. C. Conant, for the defendant in error.

By the Court, PAIGE, J. It is contended on the part of the defendant in error, that the defence offered by the defendants before the justice, under the attachment issued by Cummings, was properly excluded, upon the ground of the insufficiency of the affidavit on which the attachment was issued. This attachment was issued, under the provisions of the revised statutes. (2 R. S. 230, §§ 26, 28, as amended by the law of

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1831, p. 404. *Id.* §§ 34, 35, amended by act of 1842, ch. 107, p. 74.) Section 26 of 2 R. S. 230, authorizes an attachment to be issued, where it shall satisfactorily appear to the justice, that the debtor has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, &c. And section 34 of the act of 1831, authorizes an attachment, for the recovery of any debt or damage arising upon contract, &c. where the defendant is about to remove from the county any of his property, with intent to defraud his creditors, &c.; whether the defendant be a resident of the state or not. And section 35 of the act of 1831, provides, that the plaintiff must, by his own affidavit, or that of some other person, prove, to the satisfaction of the justice, the facts and circumstances to entitle him to the attachment; and that he has such a claim as is specified in section 34 of the same act, against the defendant, over and above all discounts which the defendant may have against him, specifying as nearly as may be, the amount of the claim, &c.

In this case, the affidavit stated, that the debt arose on contract, and specified the amount due over and above all discounts. It then stated that the plaintiff had often demanded payment of the debt, of Heaton the debtor, and that Heaton refused to pay the same; that Heaton, who is described as of Lisbon in said county, (St. Lawrence,) had told him and one Northrup, that he was going to leave the county and go to Canada, and, as the plaintiff believed, with intent to defraud his creditors, and was about to take with him all the property he had. This affidavit states substantially the fact required in section 26, (2 R. S. 230,) viz. that Heaton was about to depart from the county where he last resided. This fact, Fulton states positively, on the declaration of Heaton the debtor; and then Fulton adds, on his belief, that Heaton was about to leave the county, with intent to defraud his creditors. This affidavit, in my judgment, is sufficient. It states positively all the facts and circumstances necessary to be stated to entitle Fulton to an attachment, except as to the debtor's intent to defraud his creditors; and Fulton swears to such intent on his belief; and he

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sets forth positively the facts and circumstances upon which his belief is founded.

An affidavit is good, although the applicant swears only to his belief, as to the intent to defraud; provided he sets forth on his positive oath, the facts and circumstances on which such belief is founded. (*Johnson v. Moss*, 20 *Wend.* 145. *Smith v. Weed*, *Id.* 184. *Smith v. Luce*, 14 *Id.* 237.)

If the affidavit was sufficient, the justice committed an error in rejecting evidence of the attachment in justification of the trespass complained of; and the judgment of the justice should have been reversed by the common pleas, as to both defendants. But if the affidavit was defective, the attachment, if regular and legal on its face, (and there is nothing in the case to show it was not,) should nevertheless have been received in evidence, as a justification of the defendant Whitney, the officer who executed it. It is now a well established principle, that a process regular on its face, and apparently within the jurisdiction of the court or officer who issued it, is a complete justification to the officer who executed it. And such officer is protected, although the court or officer had no jurisdiction in fact, if the defect does not appear on the face of the process. (2 *Denio*, 86. 5 *Wend.* 170. 5 *Hill*, 440. 24 *Wend.* 485. 16 *Id.* 514, 562.) And this principle applies to process issuing from a court or officer of limited jurisdiction, as well as to process issuing from a court of general jurisdiction. (5 *Wend.* 170.) And if the justification failed as to Fulton, I think the justification did not (as is contended by the counsel of the defendant in error,) fail as to Whitney, in consequence of his uniting with Fulton, in a joint plea of justification.

This objection to the attachment being a justification to Whitney, was not taken before the justice. Not being taken there, it was waived, and could not be taken on the certiorari, in the common pleas, and cannot now be taken here. If the objection had been taken before the justice, the justice might have allowed Whitney to amend, by putting in a separate justification. This the justice had the power to do. Justices' courts possess the same powers, as respects amendments, as

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courts of record. (10 *Wend.* 214, 215. 2 *R. S.* 225, § 1. *Id.* 519, § 1. *Id.* 521, § 10, 3d ed.) Justices are required to allow amendments liberally, in all cases, where the rights and interests of the adverse parties, will not, thereby, be put in jeopardy. (12 *Wend.* 150. 15 *Id.* 557.)

Misjoinder of causes of action, in a declaration, in a justice's court, if not objected to before the justice, cannot be taken advantage of, on certiorari. (12 *John.* 347. 3 *Hill*, 609. 1 *Id.* 62.) Previous to the case of *Lovett v. Pell*, in the court of errors, (22 *Wend.* 369,) a misjoinder of counts in a court of record, was fatal on a writ of error, as well as on demurrer. (16 *John.* 146. 1 *Chit. Pl.* 205. 19 *Wend.* 546.) The case of *Lovett v. Pell*, Chief Justice Bronson says, in *Whitney v. Crim*, (1 *Hill*, 62,) he is unwilling to follow as a precedent.

The decision in *Lovett v. Pell*, was founded on the opinion of Senator Verplanck, and in opposition to the opinion of Chancellor Walworth. Senator Verplanck held, in *Lovett v. Pell*, that a misjoinder of counts was cured, after verdict, by the provisions of the revised statutes in relation to the amendment of pleadings and proceedings. (2 *R. S.* 520, § 7, sub. 5, 3d ed.) He held that the term mispleading, which is cured after verdict, used in the revised statutes, included within its sense, a misjoinder of counts.

If a misjoinder of counts in a justice's court, cannot be taken advantage of on certiorari, on the ground that it is a mere formal and technical question of pleading, or that it is mere mispleading, then the objection (which involves a question of altogether a like character,) to the defence of an officer under a joint justification, where it failed as to his co-defendant, not having been taken before the justice, cannot be taken on certiorari, or on error; or it may, like a case of misjoinder of counts, under the authority of *Lovett* and *Pell*, be regarded as a *mispleading*, and therefore cured, by the provisions of the revised statutes in relation to amendments. Much greater latitude is allowed in pleadings before justices, than in courts of record, especially in cases where the objection is not taken at the proper time. (1 *Hill*, 62.) In any view of the question, therefore,

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the objection, that the defence of the defendant Whitney failed because the defence of his co-defendant failed, 'could not be taken in the common pleas. And the decision of that court was, therefore, correct, in reversing the justice's judgment, as to him.

If then the judgment of the justice was properly reversed by the common pleas, as to the defendant Whitney, it necessarily follows, as the judgment was entire, as to both defendants, that it should have been reversed in toto. Where a judgment is entire against several defendants, whether rendered in an action for tort or on contract, it cannot be reversed as to one defendant, and affirmed as to another. (*Sheldon v. Quinlen*, 5 *Hill*, 441. *Cruikshanks v. Gardner*, 2 *Hill*, 333. 12 *John*. 434. 14 *Id.* 417.)

As the judgment of the justice was properly reversed by the common pleas, as to the defendant Whitney, it should have been reversed as to Fulton also. The original judgment of the justice, and the judgment of affirmance of the common pleas, must, therefore, both be reversed.

STEUBEN SPECIAL TERM, October, 1847. Welles, Justice.

THE PEOPLE, ex rel. Magee, vs. DENSMORE, late sheriff, &c.

In all cases of suits and proceedings upon writs of mandamus, the granting of costs to the one party or the other is exclusively a matter of discretion with the court; and they may be awarded or refused, as the equity and justice of each particular case may require.

Where a rule for a peremptory mandamus is silent as respects costs, and there is nothing to show that it was the intention of the court to grant costs to the relator, such rule will not be amended so as to provide for the payment of costs.

On the third day of February, 1847, at a special term of the late supreme court, the relator obtained an order for an alterna-

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tive mandamus to be directed to the defendant, late sheriff of Ontario county, commanding him to file in the office of the clerk of the county of Ontario, the certificate of sale executed in his name by Alonzo Seymour, his deputy, a copy whereof was annexed to the moving papers, or show cause &c. at the then next special term of said court, why a peremptory mandamus should not issue. An alternative mandamus was issued in pursuance of such order, which with a certified copy of the order, was duly served upon the defendant, on the 12th day of March following. On the 9th day of June, 1847, the same court, at a special term thereof, on application of the relator, made an order that a peremptory mandamus issue; but the order was silent as to costs.

The affidavits read on the present motion, show that at the last April special term of the court, further time was allowed the defendant, until the 15th day of May following, to file and serve his return to the alternative mandamus, and that on the said 9th day of June last, the defendant not having filed or served any return, the court granted the order for a peremptory mandamus, by default. The affidavit of the attorney for the relator states, that by the inadvertence of the counsel, the rule entered by the clerk on the granting of the peremptory mandamus omitted the words "with costs." The affidavit of Mr. Howard, the deputy clerk of the court, stated that on the said 9th day of June, James Edwards, Esq., as counsel for the relator, upon reading and filing a copy of the alternative mandamus, copy of the rule of the 3d of February, 1847, and the admission of service, moved for a peremptory mandamus, and no opposition being made, the motion was granted. That said Edwards handed the papers to him, to enter the rule, without any other directions than that the motion for a peremptory mandamus was granted; whereupon he, the deputy, entered the rule as above stated. That the motion was granted by default, no one appearing to oppose. The deputy swears farther, that if he had been aware of the statute, (2 R. S. 514, § 44, 2d. ed.) or had his attention been called to it "he

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would have entered the said rule as it ought to have been done, with costs."

A motion was now made to amend the rule directing the peremptory mandamus to issue, by adding thereto the words "with costs," in such manner as to give to the relator the costs of the proceedings, &c.

E. Howell, for the motion.

W. Barnes, in opposition.

WELLES, J. The counsel for the relator supposes that the court, on granting the peremptory mandamus in this case, was bound by law to grant costs, by force of the statute, (2 R. S. 619, § 41,) and it appears from the affidavit of the deputy clerk who entered the rule, that if his attention had been called to the section of the statute referred to, he would himself have so entered the rule, without reference to the question whether the court had actually granted costs. I think, however, that the court had a discretion to allow or refuse costs. By the sixth section of the "act relative to proceedings in suits commenced by declaration and for other purposes," (*Laws of 1833*, p. 395, § 6,) it is provided that "in suits and proceedings upon writs of *mandamus*, the supreme court may, in its discretion, award or refuse costs to any party therein." But independent of the law of 1833, I think it very questionable whether the present case came within the provision of the section of the revised statutes referred to. The case provided for there is where the mandamus is granted "*upon the coming in of a return to a previous mandamus.*" In this case there was no return to the alternative mandamus. (*The People, ex rel. Mathews, v. Onondaga C. P.* 10 *Wend.* 598.) As the law now stands, therefore, I think it safe to say that in all cases of mandamus, the granting of costs to the one party or the other, is exclusively a matter of discretion with the court, and they may be awarded or refused, as the equity and justice of each particular case may require.

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The only remaining subject of inquiry is, did the court upon granting the rule for a peremptory mandamus, actually order the defendant to pay costs? If they did, and by the inadvertence of the counsel or the clerk, it was omitted to be inserted in the rule, I think I should be justified in ordering the amendment moved for. But this should be made clearly to appear; as the present court have no power to review the proceedings of the late court. And if that court did not decide that the relator should have costs, the order being sufficient on its face to be operative, I think it must now be regarded in the same light as if it had in terms denied costs.

The affidavits entirely fail to show that costs were in fact granted by the court, upon ordering the peremptory mandamus. The only witnesses on the subject are Mr. Howell, the attorney for the relator, and Mr. Howard, the deputy clerk. They both state in their affidavits that the order was granted by default. Neither says a word as to what the decision of the court actually was, on the subject of costs. I infer from the affidavit of the deputy clerk, that the court did not in fact grant costs; although he would have entered the rule with costs upon his own responsibility, had he understood the law the same as when his attention was afterwards directed to the statute.

The motion is denied, but without costs.

SAME TERM. *Before the same Justice.*

TANNER and wife vs. NILES and others.

In proceedings for the partition of land, either at law or in equity, it is not necessary, though in most cases it is advisable, to make persons parties who are entitled only to dower in the premises, which has not been admeasured, and which extends to the whole of the premises of which partition is sought.

If the dower extends to the whole of the premises held in common, there is no reason for making the doweress a party, except where a partition of the premises cannot be made without great prejudice to the owners thereof, and a sale therefore becomes necessary; in which case there is a manifest propriety in making her a

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party, as the purchaser will hold the land purchased by him, free and discharged from the dower interest; provided the doweress has been made a party.

In that case the doweress is obliged to contribute to the costs; because they are to be paid from the proceeds of the sale, and the residue is to be distributed.

But where an actual partition and division of the land among the joint tenants and tenants in common takes place, the judgment or decree in partition will not affect the tenant, or person having a claim as tenant in dower to the whole premises.

The statute does not, in any case, contemplate a setting off or admeasurement of a dower interest, in a partition suit.

Method of apportioning the costs of a partition suit, among the several parties to such suit.

IN EQUITY. This was a bill for partition. Some time previous to the commencement of the suit, Nathaniel Wallis, jun. died intestate, seised of real estate situated in the county of Steuben, and leaving a widow (Betsey, since married to the defendant Jonathan Niles) and twelve children him surviving. The names of the children were Lucy, the wife of Clark Tanner, (the complainants,) Erastus Wallis, George C. Wallis, Miles Wallis, Nelly the wife of William Gay, Sally Ann the wife of Garret D. Powell, Isabel the wife of Moses S. Bennet, Edward E. Wallis, Eliza Wallis, Nancy Wallis, Joel Wallis and William Wallis. William died intestate and without lawful issue, before the commencement of this suit. The widow and her husband, with all the surviving children except the plaintiff Lucy Tanner, are made defendants. By a decretal order in the cause made before the vice chancellor of the sixth circuit, and bearing date the 11th of February, 1847, the rights and interests of all the parties were declared as follows: 1. That the defendant Betsey Niles was entitled to an estate in dower in the premises of which partition is sought, and also to a life estate in the portion of the premises descended to William Wallis. 2. That the defendant Jonathan Niles, as husband of the said Betsey, was entitled to his marital rights in the share or interest of the said Betsey, and to none other. 3. That each of the eleven surviving children of the said Nathaniel Wallis, jun. deceased was entitled to one equal eleventh part of the said premises, subject to the rights of the said Betsey Niles as above declared; and that the shares of the following named parties were subject

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to deductions for payments by their ancestor in his lifetime, by way of advancement, viz. The shares of the defendants Erastus Wallis, George C. Wallis and Miles Wallis, of \$800 each; the shares of the complainant Lucy Tanner, the defendants Nelly Gay, Sally Powell and Isabel Bennet, of \$400 each. By the report of the commissioners appointed in and by the said decretal order, now presented, it appeared that the defendants Erastus Wallis, George C. Wallis and Miles Wallis were respectively excluded from any share in the estate of their father, on the ground that the advancements to them were equal to the amount of their shares in the estate. The commissioners then went on and made an actual division of the premises among the remaining nine parties; first setting off and allotting to Betsey Niles a certain portion in full for her dower, as the late widow of Nathaniel Wallis, jun. deceased, and her life estate in the share of her deceased son William Wallis, and then dividing the residue of the lands among the remaining eight children, making deductions for the advancements made to the daughters as above stated.

The only question now presented was upon the apportionment of the costs among the respective parties.

R. Campbell, Jr. for the plaintiffs.

D. B. Prosser, for the defendants.

WELLES, J. By the revised statutes, (*vol. 2, p. 317, § 1*.) it is provided that when several persons shall hold and be in possession of any lands, &c. as joint tenants or as tenants in common, &c. one or more of such persons, being of full age, may apply by petition for a division and partition, &c. Section 6 provides, that "every person having any such interest as aforesaid, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such petition." Section 35 declares, that the judgment of the court upon the report of the commissioners shall be binding and conclusive "on all par-

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ties named therein and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises, after the termination of any particular estate therein; or who, by any contingency contained in any will or grant, or otherwise, may be, or may become, entitled to any beneficial interest in the premises, or who shall have any interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower." "§ 36. But such judgment and partition shall not affect any tenants, or persons having claims as tenants in dower, by the curtesy or for life, to the whole of the premises which shall be the subject of such partition; nor shall such judgment and partition preclude any person except such as are specified in the last section, from claiming any title to the premises in question, or from controverting the title or interest of the parties, between whom such partition shall have been made."

Upon a careful examination of the above recited provisions of the statute, in connection with other portions of it, I am led to the conclusion that in proceedings for the partition of lands, &c. either at law or in equity, it is not *necessary*, though in most cases it is *advisable*, to make persons parties who are entitled only to dower in the premises, which has not been admeasured, and which extends to the whole of the premises of which partition is sought.

The first section of the act provides for making partition where the lands are held by *joint tenants* and *tenants in common*. Neither of these embrace persons claiming a right of dower. (*Bradshaw v. Callaghan*, 5 John. 80.) The 6th section, however, provides for making persons entitled to dower only, parties to the suit, where the dower has not been admeasured. But if such dower extends to the whole of the premises held in common, as in the present case, there is no reason for making the person entitled to it a party, except where a partition of the premises cannot be made without great prejudice to the owners thereof, and a sale therefore becomes necessary; in which case there is a manifest propriety in making her a party; as the

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purchaser will hold the land purchased, free and discharged from the dower interest, provided she has been made a party, (§ 51;) and in that case she is obliged to contribute to the costs, because they are to be paid from the proceeds of the sale, and the residue is to be distributed. (§ 54.) But where an actual partition and division of the land among the joint tenants and tenants in common takes place, the judgment will not affect the tenant, or person having a claim as tenant in dower, &c. to the whole premises. (§ 36, *above cited*.) The act, I think, does not in any case contemplate a setting off or admeasurement of a dower interest, in a partition suit. Where the dower interest is in an undivided share of the lands to be divided, it is always proper to make the person having such interest a party, as in that case the judgment will be binding upon her, and her interest will be limited to such share when set apart. (§§ 35, 36. *Coles v. Coles*, 15 *John*. 319.) In the case last cited, the court held that where the object was to *sell* the real estate under the partition act, the widow might be made a party, and then she would be concluded; but that she was not to be made a party in partition for the purpose of *setting off* her dower. I am aware that the case was decided under the act of the 15th of April, 1813, but I am unable to perceive any substantial difference between that act and the revised statutes in this respect.(a)

My opinion therefore is, that so far as respects Betsey Niles' interest in dower in the premises in question, she will not be bound or affected by the decree in this case, as that interest extended to the whole premises sought to be divided, and in reference to that interest she is not chargeable with any costs. (*Bradshaw v. Callaghan*, 8 *John*. 565.) But as she was also entitled to a life estate in the share of her deceased son William Wallis, as tenant in common with the surviving children and heirs of Nathaniel Wallis, jun. deceased, she should be charged with the payment of one equal ninth part of all the costs in the suit.

(a) See the note of the Revisers to the 7th section of the statute.

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The defendants Erastus Wallis, George C. Wallis and Miles Wallis ought not to be charged with any of the costs; inasmuch as they receive no portion of the land partitioned. They are made defendants, and have not appeared in the cause. The decree will conclude them, but I think it would be unjust to subject them to the payment of any part of the costs. The decree should be that the costs be apportioned and paid equally between the nine remaining parties to the suit.

Decree accordingly.

KINGS GENERAL TERM, November, 1847. *Strong, Morse,*
and Barculo, Justices.

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A testator, whose will took effect previous to 1830, by the second clause thereof devised his real estate unto his four sons, R., A., I. and J., "to them and the heirs lawful from their bodies, share and share alike, and if any of my sons die without lawful issue, all his right, title and interest, in my real estate, shall devolve upon my surviving sons, to be equally divided among them. And if all my sons shall die without lawful issue, then the children of my daughters shall have all my real estate, to them, their heirs and assigns forever, but my grandsons shall have a double share each to each of my granddaughters." Held that an estate tail was given to the four sons of the testator by the primary devise to them; and that by virtue of the statute of 1786, abolishing entails, they became seised of the lands devised, in fee simple absolute. Held also, that the subsequent limitations of such lands, contained in the will, were null and void. *Barculo, J. dissented*; holding that the statute abolishing entails merely affected the primary devise in tail, by turning it into a fee simple, and left the secondary disposition to operate by way of executory devise.

Where, upon the whole will, there is a devise of an estate tail, either expressly or by implication, the act of 1786 applies. It does not annul the devise, but turns the estate tail into a higher estate. *Per STRONG, P. J.*

The statute, however, does not, in terms, or by necessary implication, extend to determinable fees. *Per STRONG, P. J.*

Where the words of a statute are susceptible of two meanings, one favorable, and the other hostile, to its principal design, the former should prevail, and control the construction. *Per STRONG, P. J.*

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THIS was an action of ejectment, brought to recover lands lying in Kings county, tried at the Kings circuit, in April, 1846, before Edmonds, C. J. A verdict for the plaintiffs was taken, by consent, for one undivided half part of the premises, subject to the opinion of this court on a case made, containing the following admitted facts.

Albert Terhune, being seised of the premises in question, on the 10th day of February, 1797, made his will, by the second clause of which, he devised his real estate unto his four sons, Roelof, Abraham, Isaac, and John, "to them and the heirs lawful from their bodies, share and share alike, and if any of my sons die without lawful issue, all his right, title, and interest, in my real estate, shall devolve upon my surviving sons, to be equally divided among them. And if all my sons shall die without lawful issue, then the children of my daughters shall have all my real estate, to them, their heirs and assigns forever, but my grandsons shall have a double share each to each of my granddaughters."

At the date of the will, the testator had four sons, who are named in the will, and three daughters, viz. Maria, Anne, and Margaret. Maria was then the wife of Stephen Emmons, by whom she then had two sons living, Abraham and Isaac. Maria died in 1799; her husband having before also died. The testator died the 7th of April, 1801, leaving him surviving his said four sons and two daughters, Anne and Margaret, and two grandsons, Abraham Emmons and Isaac Emmons.

The four sons went into possession, and so remained until the 13th of January, 1806, when Roelof died without ever having had issue, and leaving his will, by which he devised his share in the premises to his three surviving brothers. Isaac Terhune, another son, died on the 2d of October, 1835, leaving a widow, who still survives, but without leaving any issue, and devising, by his will, all his interest in the premises to his brother John; and making a provision for his widow, which she accepted in lieu of dower. Abraham Terhune, another son, died on the 19th of October, 1840, without issue, leaving a widow. By his will, he devised, by a residuary clause thereof,

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his interest in the premises to his said wife and Maria Lott, one of the plaintiffs, to be equally divided between them. John Terhune, being the last surviving son, entered into possession of the whole of the premises, and held the same until the 29th of June, 1842, when he also died, intestate and without issue. Anne, daughter of Albert Terhune, died in 1826, without leaving any issue. Abraham Emmons died in 1810, without issue. Isaac Emmons, the remaining son of Maria, married Ann Denise, by whom he had a daughter Maria, who is one of the plaintiffs; her father and mother both being dead. Margaret Terhune, daughter of Albert Terhune, married John Wyckoff, by whom she had twelve children, ten of whom are still living, and Eliza, a descendant of one of the two deceased children, now the wife of Martin J. Johnson.

The plaintiff claims, as heir at law of John Terhune, and as devisee under Abraham's will, four-eighteenths of the premises in question.

W. J. Cogswell & H. B. Cowles, for the plaintiffs. I. Upon the death of Albert Terhune, his sons Roelof, Abraham, Isaac and John, became seised of an estate in fee simple absolute in his real estate as tenants in common. 1. Were it not for a statute of this state, passed February 23, 1786, abolishing entails, and the act of 1782, thereby repealed, (*Greenl. L. vol. 1, 205*,) his sons would, by the devise to them contained in his will, have taken an estate in fee tail in his real estate, by express words. (*Co. Litt. 19, a. b. 20 a. Westm. 2. 13 Edw. 1, ch. 1, cited 2 Just. 332 to 335. Statute of Wills, 32 Henry 8, ch. 1. Cowp. 234. Const. of the State of N. Y. 1777, § 35.*) That is to say, they would have taken several estates in tail with cross-remainders in tail. (*4 Cruise, 4th Am. ed. by Huntington, tit. 32, Deed 21, p. 318, § 59. Doe v. Wainwright, 5 T. R. 427. Dyer, 303. King v. Rumbal, Croke James, 448, cited in Fearn, 8th Lond. ed. by C. Butler, 243. Wright v. Holford, Cowp. 31. 4 T. R. 710. Doe v. Webb, 1 Taunt. 234. Cruise, tit. Devise, ch. 15, §§ 26, 45. 2 East, 36.*) 2. By the operation of that statute, in force when the will

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was made and at the death of the testator, those several estates tail were converted into fees simple absolute. (1 *R. L.* 52. 2 *Greenl. L.* 205. *Anderson v. Jackson*, 16 *John.* 403, 404. *Wilkes v. Lyon*, 2 *Cowen*, 391, 393. *Lyon v. Burtis*, 20 *John.* 489. *Grout v. Townsend*, 2 *Hill*, 556. 2 *Denio*, 337. 12 *Fonbl.* 169.)

II. Under that devise, upon the death of either son without issue, his right, title and interest in the real estate whereof Albert Terhune died seised, would, were it not for the statute of 1786, have vested in possession in the survivors by way of remainder. (*Chaddock v. Cowley*, *Cro. James*, 695, cited in *Fearne*, 243. 5 *T. R.* 427. *Spalding v. Spalding*, *Cro. James*, 84, *a.* *Dyer*, 303, *a.* *Wright v. Pierson*, cited in *Fearne*, 126. 1 *Jarm. on Wills*, 359.) Being limited upon a previous vested estate of freehold, it must have taken effect as a remainder, if at all. (*Doe v. Morgan*, 1 *T. R.* 763.) It could not by way of executory devise. (*Fearne*, 385, 284. *Purefoy v. Rogers*, 2 *Saund.* 388, *n.* 9. *Com. Rep.* 372. *Wealthy v. Boswell*, *Rep. K. B. Temp. Hardw.* 258. *Tenny, ex dem. Agar, v. Agar*, 12 *East*, 253 to 261. *Wilkes v. Lyon*, 2 *Cowen*, 333, 389.) But that remainder being also an estate in tail, could no more live under the operation of our statute abolishing entails, than the previous estate in tail to the sons.

III. The sons of Albert Terhune having become seised, at his death, of an estate in fee simple absolute in his real estate, the subsequent limitations in that devise became inoperative and void. (2 *Bl. Com. ch.* 11, *tit. Estates in Possession and Remainder*, &c. *p.* 167, § 2. *Plow.* 29.)

IV. The plaintiffs, in right of the plaintiff Maria Lott, are entitled to recover a share in the real estate claimed in the declaration in this cause, equal to four-eighteenths. 1. In the events that have happened, there are thirteen persons entitled to share in the real estate whereof Albert Terhune died seised, viz. the ten surviving children of Margaret Wyckoff, Ann Terhune, widow of Abraham, and Maria Lott and Eliza Johnson, great nieces of John Terhune. 2. Abraham Terhune died seised of an undivided third part thereof, and at his death Ma-

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ria Lott became seised of the one-half of his one-third, as devisee under his will, and Ann Terhune of the other half thereof. John Terhune died intestate seised of two other undivided thirds thereof. At his decease, Maria Lott also became seised of the one-twelfth of his two thirds thereof, as one of his heirs at law. (1 R. S. 752, §§ 8, 9.) Making the share of Maria Lott, in the whole of the said real estate, equal to four-eighteenths.

V. Should that devise, notwithstanding the statute abolishing entails, be so construed as to allow the share of either son, upon his dying without issue, to go over to the survivor by way of executory devise, then, and in that case, the devise would be executed in John, the last survivor. (*Doe v. Founereau*, Doug. 479. *Fearne*, 526. *Cruise*, vol. 6, 466, tit. *Devise*, 38, ch. 20, §§ 26, 28.) And the fee would become absolute in him. (*Lyon v. Burtis*, 20 John. 486, 489. 1 R. L. 52.) Then Maria Lott's share in the estate would be equal to one undivided twelfth part thereof, as one of his heirs at law.

VI. The limitations in that devise to the children of the testator's daughters cannot take effect as a remainder, in consequence of our statute abolishing entails. (*Lyon v. Burtis*, 20 John. 486, and authorities there cited.) Nor as an executory devise; as it depends upon an indefinite failure of issue. (*Beauclerk v. Doremer*, 2 Atk. 308. *Tenny v. Agar*, 12 East, 253. *Wilkes v. Lyon*, 2 Cowen, 333, 396 to 399. *Patterson v. Ellis*, 11 Wend. 287, 293.) But if it could, Maria Lott would in that case be entitled to a share in the estate equal to two-eighteenths; taking, under the will of Albert Terhune, the share which her father, Isaac Emmons, son of Maria Emmons, the daughter of Albert Terhune, would take if living. (1 *Jarm. on Wills*, 728, 733, 736. *Goodright v. Jones*, 4 Maule & Sel. 88. 1 B. & P. 250. 2 Wils. 29.) But the plaintiffs insist that Abraham Terhune died seised in fee of one undivided third part of the estate, and John Terhune of the other two-thirds thereof; and that the plaintiffs are entitled to recover a share in the premises in question equal to four-eighteenths, for the

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reasons above given. (*Gemells v. Ward, Willes' Rep.* 211. 3 D. & E. 94, 88. 1 *Jarm. on Wills*, 40.)

John A. Lott & Geo. Wood, for the defendants. I. The four sons of Albert Terhune would, anterior to the acts of 1782 and 1786, have taken, under the primary devise to them in his will, respectively, an estate tail in the premises devised. (*Cruise's Dig. tit. 2, Estate Tail, ch. 1, § 1, 12. Id. tit. 38, Devise, ch. 12, § 2, 5.*) II. On the death of either one of said sons, his estate tail, as aforesaid, in case he died without leaving issue living at his death, would have gone over to the surviving sons; which would have the effect of making the primary devise in tail subject to a contingent determination upon the happening of that event. Because, 1. The limitation over to the children surviving the first taker, confines the failure of issue to the death of the first taker, at which time the event of survivorship of course takes place. 2. An estate tail, as well as a fee, may be subject to such conditional limitation. (*Cruise's Dig. tit. 32, Deed, ch. 24, § 52; tit. 38, Devise, ch. 15, §§ 25, 35, 36; tit. 16, Remainder, ch. 1, § 63, ch. 2, § 32; tit. 32, Deed, ch. 26, § 18. Davis v. Norton, 2 P. Wms. 390.*) III. The act of 1786 operating on this will, turned the first primary estate tail into a fee. (*See 1 R. L. of 1813, p. 52.*) IV. Being turned into a fee, it is still subject to the same contingent determination, viz. upon the death of the first taker without leaving issue living at his death. And upon the happening of that event, the first estate ceases, and the limitation over to the surviving sons takes effect. (*Anderson v. Jackson, 16 John. 382, and cases cited. See Fosdick v. Cornell, 1 Id. 440; Cruise's Dig. tit. Devise, ch. 20, § 24; 11 John. 337; Cutter v. Doughty, 23 Wend. 518.*) V. John Terhune, one of the sons, having survived all his brothers, who all died without leaving issue at their death, the whole real property vested in him as such survivor, under the limitation of the will. (*Cruise, tit. Devise, ch. 20, § 1, 17, 18, 19, 22. Jackson v. Elmendorf, 3 Wend. 222. Jackson v. Christman, 4 Id. 277. Jackson v. Thompson, 6 Cowen, 178. Jackson v. Bellinger, 18 John. 381. Cutler v. Doughty, supra.*) VI. John Terhune

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the son taking under the secondary devises upon the limitations over, the parts respectively given in the primary devises, took estates in fee in those several parts, to cease and determine upon his death, without issue living at his death; because, 1. The primary devise being made upon such definite failure of issue, the ulterior devise will be construed to be limited upon the like definite failure of issue. (1 *Ld. Raym.* 203. *Doug.* 264. *Radford v. Radford*, 1 *Keen*, 486.) 2. The limitation over on the death of John without issue, being to the children of his sisters, the daughters of the testator, such children (according to a well established rule of construction) as shall be living at the determination of the estate immediately prior thereto will take. (*Ellison v. Airey*, 1 *Ves. sen.* 111. *Attorney Gen. v. Crispin*, 1 *Bro. C. C.* 386, and cases collected in *Roper on Leg.* 59. *Collin v. Collin*, 1 *Barb. Ch. Rep.* 637.) 3. This rule has the effect of confirming the failure of issue to the death of John, and not embracing an indefinite failure of his issue. (*Rex v. Jeffrey*, 2 *T. R.* 589. 6 *John.* 385.) VII. Such of the children of the daughters as were living at the death of John, take the whole estate to the exclusion of grandchildren, who never take under that designation, when there are children who answer fully the designation. (*Tier v. Pennel*, 1 *Edw. Ch. Rep.* 354. *Jackson v. Bradshaw*, 3 *John.* 297. *Jackson v. Staats*, 11 *Id.* 246, and cases cited in *Roper on Leg.* 69. 2 *Jarm. on Wills*, 69, 73. *Cutler v. Doughty*, *supra.*) VIII. Maria Lott, the plaintiff, being a grandchild and the child of the daughter Maria, takes no part of the estate.

STRONG, P. J. The counsel for the respective parties, who have argued the case very ably, agree that by the primary devise of the land in dispute to the four sons of the testator, they would have taken an estate tail, if the will could be construed agreeably to the law as it stood previous to any legislation on the subject in this state. By the act of February 23d, 1786, which was passed before the date of the will, they are to be deemed and adjudged to have become seised, each of the undivided fourth part of such land in fee simple absolute.

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The secondary devise to the sons could not, consistently with the statute, take effect as cross remainders; as no remainder can be limited upon an estate in fee simple. It has been long settled, however, and was the rule previous to the passage of our revised statutes, that, in order to carry into effect the intentions of a testator, such secondary estates, if limited to take effect within the lives of persons in being at the death of the testator, or within twenty-one years and nine months thereafter, would not be adjudged technical remainders, but should be deemed executory devises; which might be limited by a will, but not by a conveyance *inter vivos*. At common law, where the first devise is in terms of a fee simple, and that is followed by a subsequent gift of the same lands to another, provided the first taker shall die without lawful issue or heirs of his body, the latter provision qualifies the former, and constitutes the whole either an estate tail or a determinable fee. If the secondary estate is to take effect upon an indefinite failure of issue, the first estate becomes an estate tail. But if the devise be predicated upon a failure of issue, which must happen to make it vest within the requisite time for limiting executory devises, the primary estate is a determinable fee. This is by implication. The apparent intention of the testator, in this case, indicated by the first devise, if taken alone, is qualified by the subsequent limitation, showing, upon the whole, a different intent. And taking the whole will together it is evident that he did not design to confer an estate free from all qualifications. Where *upon the whole will* the devise is of an estate tail, either expressly or by implication, the act of 1786 applies. It does not annul the devise, but turns the estate tail into a higher estate. The statute however, does not in terms, or by implication, extend to determinable fees. The primary devises in *Fosdick v. Cornell*, (1 John. 440,) *Jackson v. Staats*, (11 Id. 337,) *Anderson v. Jackson*, (16 Id. 382,) and *Cutler v. Doughty*, (23 Wend. 518,) which were cited on the argument, were in terms devises of a fee simple; but they were qualified, and reduced to determinable fees, by subsequent executory devises. They were to take effect, if at all, upon a failure of issue within the prescribed

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period. Clearly there was no devise of an estate tail in either of those cases, and they have no application to the case now under consideration. In the present case, the primary devise to the testator's four sons was not in terms of a fee simple, but, as I before remarked, of an estate tail. That estate was in no manner restricted or qualified by the subsequent devises of the same lands. With or without those devises, the estate tail given to each would have terminated on his dying without issue, and not until then, however remote the failure of such issue might be. Had the will contained no other than the primary devise of an estate tail, there would have been a reversion left in the testator's heirs. That reversion would have been cut off by the new estate given by the statute. The subsequent devises were of estates carved out of what would otherwise have been such reversion. What difference could it make whether that descended to the heirs or was devised to others? Clearly the same rule would apply, and the same effect be produced. The time when the failure of issue of the first takers might happen, qualified, and could affect, the secondary estates only. They would be executory devises if the failure must necessarily happen within the requisite periods; otherwise they would be contingent remainders. But in either case they might have been barred by a common recovery. (4 *Kent's Com.* 270.) Chancellor Kent cites in support of this position, *Fearne*, 66, 67, 107, and *Driver v. Edgar*, (*Cowp. Rep.* 379.) In that case the devise was to Mary Edgar and the heirs of her body lawfully begotten, and in case she should depart this life not having children or child lawfully begotten *living at her decease*, the estate given to her was to descend and go to the testator's heirs male. Mary Edgar suffered a common recovery, and died without issue. Lord Mansfield said that if she was tenant in tail to the hour of her death, (which he said she was,) nothing was so clear as that all conditions limited upon such estate tail were avoided by the common recovery which had been suffered. If the act of 1786 should be construed to operate so far only as to convert the estate tail expressed in the will in question in this case into a determinable fee, then the subsequent limita-

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tions would be valid. But then the absolute power of alienation would be suspended more effectually, and for a longer period, than if such act had not been passed; as the proprietor of such fee could not cut off the executory devises by suffering a common recovery. This would, in some degree, contravene the principal object of the framers of that act, which was to prevent a long suspension of the power of alienation; and the presumption is therefore against such construction. It is not conclusive, I admit; as it frequently happens that reformers create changes, in particular instances, at war with their main object, and against which no effectual provision could well be made. Still, when the words of a statute are susceptible of two meanings, one favorable, and the other hostile, to its principal design, the former should prevail and control the construction. It is true there is nothing in the statute denoting an intention to destroy executory devises. But it is by no means probable that, while endeavoring to annihilate one species of perpetuity, they were solicitous to prolong the suspension of the power of alienation in a more objectionable and less tangible shape. Neither do I think that the terms of the act would be satisfied by confining the change to the first clause of the will. It necessarily destroys any interest in conflict with the new estate. Clearly it has that effect in the case of a technical remainder. Why is it not equally fatal to executory devises? The terms used to define the substituted estate would seem to preclude the idea that it was to be subject to any restrictions or limitations. That is the construction given to them by the ablest elementary writers. Littleton, quoting from Bracton on the words "*Feodem simplex*," says, "*Simplex idem est quod purum, simplex enim dicitur quia sine plicio, et purum dicitur quod est merum et solum sine additioni, simplex donatio et pura est ubi nulla addita est conditio sine modus. Simplex enim datur quod nullo additamento datur.*" Sir Edward Coke, in his commentaries on Littleton, says, (*vol.* 1, 1 *b.*) that the word simple properly excludeth both conditions and limitations that defeat or abridge the fee. Sir Matthew Hale, in his analysis of the common law, says, (*p.* 57, § 30,) "An absolute fee simple is such as

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has no bounds or limits annexed to it, and is an estate to a man and his heirs absolutely forever." Powell, in his work on devises, says, (*p.* 230,) "A fee simple absolute is where lands are given to a man and his heirs absolutely, without any end or limitation put to the estate." And Chancellor Kent says, (*4 Com.* 5,) "A fee simple is a pure inheritance clear of any qualification or condition. It is an estate of perpetuity, and confers an unlimited power of alienation." Every restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as, a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple and becomes a fee subject to a condition." A fee simple and a fee simple absolute may be, as I intimated on the argument, and as was said by Chief Justice Thompson in *Jackson v. Van Zant*, (*12 John.* 177,) the same thing. But the word "absolute," prefixed to "fee simple" in the statute, is very significant. It was designed to prevent any inference that the substituted estate might be a determinable fee—such as is meant by Sir William Blackstone (*2 Com.* 173,) and other writers, when they say that a fee simple may be limited on a fee simple by way of executory devise. When speaking of such a determinable fee (for it is nothing else) they never characterize it as absolute or pure. Indeed, either would involve a contradiction. Sir Matthew Hale draws a clear distinction between the two estates. After giving the definition of a fee simple absolute, which I have already quoted, he says, (*p.* 58,) "A limited or qualified fee simple is such as has some collateral matter annexed to it whereby it is made by some means determinable, viz. by limitation or condition." Powell, quoting Plowden, 557, in classifying estates in fee simple, speaks of the two as distinct from each other. The same distinction prevails in all the elementary works which I have had an opportunity to examine.

The statute, by conferring the absolute estate, without any qualification or restriction upon those who would otherwise have become seised of estates tail, necessarily excludes the valid limitation of an executory devise. Chancellor Kent says, (*4*

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Com. 270,) "a valid executory devise cannot exist under an absolute power of disposition in the first taker. When an executory devise is duly created it is a species of entailed estate to the extent of the authorized period of limitation. It is a stable inalienable interest; and the first taker has only the use of the land pending the contingency mentioned in the will." The manifest difference between the statutory substituted estate, and a primary estate in fee simple, qualified by a subsequent executory devise, in a will, is this: by the executory devise the testator declares his intention to qualify the estate first given in terms, and it is reduced accordingly. But there is no such intent expressed in the statute. That does not declare that the converted estate may be qualified by, or subject to, an executory devise, but it is peremptory that the estate must be construed to be a fee simple absolute; and all conflicting estates specified in the will are necessarily destroyed. The language of the act of 1830, (1 R. S. 722, § 2,) is different; that act provides that the converted estate shall be adjudged a fee simple, and if *no valid remainder be limited thereon, shall be a fee simple absolute*. This is very significant to show that the framers of that act supposed that although a remainder could be limited upon a fee, yet that it could not co-exist with a fee simple absolute. Such opinion is also apparent from the revisers' notes. The act of 1830 cannot, however, have any operation in the case, as the estate, whatever it was, vested in the sons before its passage.

In this case I think we are bound to adjudge that the four sons of the testator took, under the primary devise to them, estates in fee simple absolute, and that the subsequent limitations of the lands devised to them are null and void. In doing this we shall defeat some part of the intentions of the testator. There can be no doubt as to those intentions. They are clearly expressed. His principal intention was to give an estate tail to his four sons. The statute defeats that, and it is equally fatal to the other intentions which are at war with its main design. It is undoubtedly desirable that the intentions of the testator should prevail when they can be carried into effect

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consistently with the rules of law. But there are many cases, constantly occurring, where that cannot be done; and it is better that such intentions should then fail than that the application of the law should be vague or uncertain.

The plaintiffs are entitled, in right of Mrs. Lott, to the four-eighteenth parts of the lands in dispute, three-eighteenths under the will of Abraham Terhune, and the other eighteenth by descent from John Terhune, the last surviving son of Albert Terhune the testator.

MORSE, J. That Albert Terhune intended, by the second clause of his will, to devise to his four sons, as tenants in common, an estate in fee tail in all his real and freehold property, is manifest, in that the words of the devise form a clear and adequate definition of an *estate in fee tail general*. The question submitted to this court for its decision is, what is the legal effect and consequence of this very clear intention of the testator?

The will was made in 1797, and the testator died in 1801. The first statute abolishing entails was passed in 1782. In 1786 another act abolishing entails was passed, repealing the act of 1782. By the act of 1786, it is declared that all estates tail are abolished, &c. "And further, that in all cases where any person or persons would, if the said act, (the act of 1782,) and this present act had not been passed, at any time hereafter become *seised in fee tail* of any lands, tenements or hereditaments, *by virtue of any devise*, gift, grant or other conveyance heretofore made or hereafter to be made, or by any other means whatsoever, such person and persons, *instead of becoming seised thereof in fee tail, shall be deemed and adjudged to become seised thereof in fee simple absolute.*"

This was the law when Albert Terhune made his will, and at the time of, and long after, his death. That his four sons would have been seised as tenants in common of an estate in *fee tail* by virtue of the said devise made to them, if the above mentioned acts had not been passed, cannot be, and is not, doubted. On the death of their father they became seised of

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his real property by virtue of the devise to them, and becoming so seised, this court is commanded to *adjudge* them to have been seised in *fee simple absolute*. It seems to me that the term fee simple signifies that which is inconsistent with the idea of a fee complex, by reason of a condition or otherwise, and that the word absolute was added in the act of 1786, to guard against any possible construction of the term fee simple, founded on the inaccurate application of those words as applied to executory devises; in relation to which it became common to say that a fee simple might be limited after a fee simple. This having become a common mode of expression, it was doubtless supposed that courts might construe the act of 1782 so as to give the words fee simple the inaccurate signification which they had obtained in connection with the doctrine of executory devises, and hence the word absolute was added, much for the like reason that one might speak of a *perfect* circle to insure his being understood to mean a circle, and not a figure of any other shape. The word *perfect* would add nothing to the signification of the sentence, and is only useful as it renders it beyond question that the speaker could not have intended to use the term circle in a loose and inaccurate sense, to express what might in some respects resemble, but which was not, a circle, but to use it in its primary and accurate sense. So the legislature, in the act of 1786, added the word *absolute*, to put it beyond doubt that they used that term in its primary and true sense, as contradistinguishing the fee they were speaking of from all kinds of conditional estates—unloosed—untied—absolved from all restriction and condition.

I concur with Mr Justice Strong, in his construction of the statutes abolishing entails, &c., and of course in the judgment to be given in this cause.

BARCULO, J., dissenting. The case turns upon the construction to be given to the second clause of the will of Albert Terhune. The first duty to be performed by the court is, to ascertain the *intention* of the testator; the next is, to carry out that intention, so far as the rules of law will permit. In regard

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to the first part, there is but little difficulty. It is quite apparent that the testator intended to give the estate to his four sons and to their children ; and in case any of the sons should die without children living at the time of his death, that the survivors should take the share of the deceased son ; and in case all the sons should die without children, then that the children of his daughters should have the estate. The events contemplated by the will have happened. One son after the other has died without children, until all are dead, leaving no issue to take. Hence the question to be resolved, To whom does the estate now belong ?

The counsel for the plaintiffs contend that the four sons took an absolute estate in fee simple, free from all limitations and contingencies. The defendant's counsel, on the other hand, contend that the estate to the sons was subject to a contingent determination in favor of the survivors, in case of the death of any of them without leaving issue living at his death. All agree that the language of the devise would have made the primary estate an estate tail, prior to the statutes abolishing entails. The act of the 23d of February, 1786, which governs this case, provides, that in all cases where any person, independently of the act, if no act had been passed, would become seised in fee tail, such person shall be deemed and adjudged to become seised in fee simple absolute. Hence the four sons, by virtue of this statute, instead of becoming seised in fee tail, according to the terms of the will, became seised in fee simple. In other words, the statute converts the fee tail into a fee simple.

What then becomes of the contingent estate limited over to the survivors, in case of the death of any son without lawful issue ? Is that also cut off by operation of the statute, or does it survive as an executory devise ? This is a grave and important question, not only as it affects these parties, but more especially as it regards those great principles which lie at the foundation of the law of devises. The slightest departure from them may produce incalculable mischiefs in disturbing and unsettling of titles by will ; by which, perhaps, one half of the

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real property in this state is transmitted from generation to generation. I am unable to find any decision of this question in the courts of this country. It was adverted to, but not decided, in *Grout v. Townsend*, (2 *Hill*, 554.) In that case, the testator devised to his daughter and the heirs of her body forever, with a limitation over in case of her death without such heirs. Bronson, justice, in delivering the opinion of the court, says: "Whether the limitation over to the children of Nicholas Viacher, in the event of Rachel's dying without heirs of her body, was or was not good by way of executory devise, is a question which, in the event that has happened, can never arise, and we need give ourselves no concern about it." When the same case was decided in the court of errors, (2 *Denio*, 336,) Senator Porter delivered the opinion, in which he says, "the limitation over is void, because it was to take effect on an indefinite failure of issue." Both of these eminent jurists seem to consider it an open question.

From the best consideration I have been able to give the subject, I have arrived at the conclusion that the statute merely affects the primary devise in tail by turning it into a fee simple, and leaves the secondary disposition to operate by way of executory devise. 1. Such a construction will carry out the manifest intention of the testator; which courts are always bound to do, unless it conflicts with some established rule of law. 2. This construction is consistent with, and is required by, settled principles of law in relation to devises. The limitation over, on the death of any son without issue, to the survivors, is on a definite failure of issue, and therefore there is no legal objection, on this score, to its being an executory devise. (*Fosdick v. Cornell*, 1 *John*. 440. *Anderson v. Jackson*, 16 *Id.* 382. *Jackson v. Christman*, 4 *Wend.* 277. *Jackson v. Thompson*, 6 *Cowen*, 178. *Wilkes v. Lion*, 2 *Id.* 333. *Lion v. Burtis*, 20 *John* 483. *Cutler v. Doughty*, 23 *Wend.* 518. *Id. v. Id.*, 5 *Mass.* 500.)

A fee may be limited, by executory devise, after a fee. (4 *Kent's Com.* 260.) If, therefore, the testator had, by the primary devise, given the estate to his four sons in fee simple, the

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limitation over would have been good as an executory devise. Nay, it is conceived that if the testator had used the very words of the statute, and given the estate to his four sons, and declared that they should be seised in *fee simple absolute*, and followed it with a limitation over to the survivors, in case of the death of one without leaving issue, the estate would be subject to the contingent determination. This proposition is too plain to require authorities to be cited. If, then, the testator could not, by using the phraseology of the statute, cut off the limitation, how can the statute do it?

The statute merely converts the *fee tail* into a *fee simple*; cutting off only such remainders as are incident to, and inseparable from, an estate tail. Now, in this case, the limitation over would not, under the English law, have been a remainder after an estate tail. It was, at all events, an executory devise to become operative on any son dying without living issue. (*Driver v. Edgar*, *Cowp. Rep.* 379. *Fearne on Rem.* 66.) It is true, that a common recovery suffered by the tenant in tail before the happening of the event, might bar the estate depending upon the event. (4 *Kent's Com.* 270.) Nevertheless, it is clear that an executory devise in fee could be limited after either a fee simple or a fee tail; and therefore it was not an estate peculiar to either. Hence it follows that when the statute comes in and turns the fee tail into a fee simple, it cuts off all remainders and limitations inconsistent with a fee, but it leaves unimpaired all limitations and contingent estates which are consistent with a fee simple. The statute, as it were, alters the reading of the will. It inserts the term *fee simple* wherever the testator has used words of entailment. By the light of this lamp, the clause in question would read, "I give unto my four sons all my real estate, to them and their heirs, share and share alike, and if any of them die without lawful issue, his share is to go to the survivors." This language would clearly give a fee simple to each of the sons, subject to a contingent determination on his dying without issue, by which the fee would pass to the survivors.

It is to be borne in mind that the very object of the institu-

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tion of executory devises was to support the will of the testator ; and that by its very definition, " it is a limitation of a future contingent interest in lands, *contrary* to the rules of limitation of contingent estates in conveyances at law." (4 *Kent's Com.* 263.) It is also to be remembered that the statute abolishing entails, had for its object the destruction of *perpetuities* resulting from entailments. Now the reason of the law was never applicable to executory devises ; for it is indispensable in those limitations that the estate should be limited to vest within 21 years after a life or lives in being. (4 *Kent's Com.* 271.) That such was the view taken by the legislature, at the last revision, is apparent from the fact, that while exterminating perpetuities, they enacted that where a remainder in fee should be limited upon any estate which would be adjudged a fee tail, according to the law of the state as it existed before the abolition of entails, the remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker without issue living at the time of his death, (1 *R. S.* 722, § 4.)

There is nothing whatever in the act of 1786, to show that the legislature was hostile to, or in any way intended to interfere with, executory devises. On the contrary, the decisions for the last sixty years manifest a leaning towards this mode of fulfilling the intentions of testators. It is true, as contended by the plaintiff's counsel, that the power of alienation may be suspended longer by an executory devise, than by an estate tail, *if the tenant in tail chooses to suffer a common recovery* ; but this has nothing to do with the question. The evil aimed at by the legislature was not the suffering of recoveries ; but it was the suspension of the power of alienation, by not suffering a recovery, but by keeping the estate alive for several generations, until all the issue in tail became extinct.

If, then, executory devises were originated for the purpose of giving effect to the intentions of testators ; if they are equally consistent with estates tail and estates in fee simple ; and if the statute of 1786 was not directed against them, I am unable to discover the slightest reason for cutting off the estate so limited

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by the will in question. On the contrary, I think we are bound to give effect to the intention of the testator by declaring the limitation good as an executory devise; and that a different construction would be an unwarrantable interference with the designs of the testator, not called for by any rule of construction or principle of law.

If I am correct in this conclusion, then the whole estate became vested in John, on the decease of his three brothers without issue. The wills of the deceased brothers could not dispose of their estates, for the simple reason that the event which gave efficiency to the will, also terminated their interest, viz. death.

The question then arises, who takes the estate on the death of John? The will declares, "if all my sons shall die without lawful issue, then the children of my daughters shall have all my real estate to them their heirs and assigns forever." Whether the testator actually intended that the children of the daughters should take whenever the issue of the sons should fail, or only in case of such failure at the death of the last son, may admit of some doubt. But there is no doubt that, by the settled principles of law, this is to be deemed a limitation after an *indefinite failure of issue, and therefore void*. (*Anderson v. Jackson*, 16 John. 382, and cases there cited. 4 Kent's Com. 476, and cases cited in note.) Courts are at liberty, in last wills and testaments, to effectuate the intention of the testator, if by law it can be done. But in ascertaining what that intention is, the construction which has been put upon like words, and the artificial rules, by which it is styled and fixed in the authorities, are to be inflexible guides where they distinctly and pointedly apply. (*Littlebridge v. Adie*, 1 Mason's C. C. Rep. 234.) It follows, therefore, that on the death of John Terhune intestate, the premises in question descended to his heirs at law. Maria Lott, being one of twelve heirs at law, entitled to share equally in the estate, is seised of one equal twelfth part of the premises in question, and the plaintiffs are entitled to recover accordingly.

Judgment for plaintiffs.

1 584
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71 AD 549

SAME TERM. *Before the same Justices.*

BRADY vs. THE MAYOR, &c. OF BROOKLYN.

The 40th section of the act incorporating the city of Brooklyn, which authorizes the common council to cause all the streets within the first seven wards of the city to be graded, levelled, gravelled and paved, to assess the expenses upon the owners of the lands benefitted, and to collect the money, necessarily gives to them the power to make the requisite contracts, and devolves upon them the duty of performing them, on their part.

Where there is a capacity to contract, with a liability to pay, there is generally a power to arbitrate. And the fact that one of the parties is a corporation makes no difference.

Corporations have all the powers of ordinary parties, as respects their contracts; except when they are restricted, expressly, or by necessary implication.

A submission to arbitration may be made by a corporation, by a resolution or ordinance adopted at a meeting thereof. It need not be under the corporate seal. It is not necessary the proceedings of a corporation, at its corporate meetings, should be authenticated by its seal.

Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all its contracts, whether sealed or unsealed, written or by parol, are valid.

The form of a submission to arbitration is a matter of indifference. It is sufficient if it appears, from the acts of the parties, that they intended to arbitrate, and that the decision of the arbitrators should have the effect of an award.

Where the common council of a city passed a resolution directing a sum which had been reported by arbitrators to be due to a contractor for extra work in grading and paving a street, to be added to the assessment for grading and paving that street; *Held* that such resolution was a substantial acknowledgment, on the part of the corporation, of the extent of the debt, and a promise to pay it. And that after such resolution had been assented to by the contractor, the claim became valid against the corporation to the extent specified therein; and that such resolution could not afterwards be rescinded except by the mutual agreement of the parties.

Where there are no arbitration bonds given, upon a submission to arbitrators, the proceedings upon the reference are considered as a statement of accounts between the parties, and an admission of the balance due. In such a case the award can be given in evidence under the money counts, and particularly as an account stated.

MOTION to set aside the report of the sole referee. The action was *assumpsit*, brought in the court of common pleas of the county of Kings. The declaration contained the common counts for work and labor and materials, together with the

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money counts, and an account, stated. The defendants pleaded the general issue, and gave notice of set-off. By an order of the court of common pleas, made at the May term, 1847, the cause was referred to A. C. Bradley, sole referee, by whom it was heard. Upon the hearing before him, the plaintiff proved the execution of an agreement between himself and the defendants for the grading and paving of a part of Union-street, in Brooklyn, dated July 25th, 1845, in the manner and for the price therein specified. It also appeared that the work was done by the plaintiff; that shortly after commencing the work the plaintiff went before the street committee and complained that the filling requisite to raise the grade of that part of Union-street, at and adjacent to Columbia-street, was greater than represented as required, by the profile exhibited, and that he wished to be discharged from his contract. The committee refused to do any thing in the matter, and said the plaintiff must finish his contract, and that if he had any claim for extra work he must present it after completing his contract. It appeared from the minutes of the common council, that on the 20th of July, 1847, the street committee reported on the petition of the plaintiff for compensation for extra filling on Union-street, in favor of referring said claim to three persons as referees, two to be chosen by the common council and one by the petitioner; which report was adopted. On the 14th of September, 1847, the street committee presented the report of Messrs. Talmage, Dougherty and Dimon, referees, who had been appointed in the matter, by which they awarded to the plaintiff the sum of \$787,88, in addition to the amount the work would come to at the prices specified in the contract; and they stated the costs of the reference to be \$30. Upon which a resolution was passed directing the street commissioner to include in the assessment of grading and paving Union-street the sum of \$817,88. The plaintiff then proved that on the 27th of February, 1847, this resolution was rescinded by the common council. Such other portions of the testimony as are material, are referred to in the opinion of the court.

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The referee reported that the plaintiff was entitled to recover of the defendants the sum of \$823.23.

J. L. Campbell, for the plaintiff. 1. Independent of any award, the facts proved constitute a valid cause of action. And from the evidence adduced on the trial, it appears that the plaintiff was legally entitled to a greater amount of damages than was awarded by the referee. 2. The fact that in this case the common council were acting on behalf of others, did not render their submission to an arbitration invalid. (*Shelf v. Bailey*, 1 *Comberbach*, 183. *Burrell v. Jones*, 3 *Barn. & Adol.* 47. *Davis v. Ridge*, 3 *Esp.* 101. *Weed v. Ellis*, 3 *Caines*, 254.) 3. The referees, Talmage, Dimon and Dougherty, were duly appointed arbitrators. (*Diedrick v. Richley*, 2 *Hill*, 271.) 4. Their award was rightly given in evidence under the count upon an account stated. (*Hays v. Hays*, 2 *Wend.* 363. *Keen v. Batshore*, 1 *Esp.* 194, 5.) 5. Their award was final and conclusive; and even though wrong, cannot be set aside. (*Mitchell v. Bush*, 7 *Cowen*, 185.) 6. Even if this could be done, the defendants have expressly affirmed its validity, by directing the amount reported due to the plaintiff to be included in the assessment. 7. Even if the common council had no power, by their submission, to bind the parties concerned in the improvement, they have bound themselves. (*Smith v. Van Nostrand*, 5 *Hill*, 419. *Moss v. Rossie Lead Mining Co.*, *Id.* 137. *State of Indiana v. Woram*, 6 *Id.* 33.)

J. Humphrey, for the defendants. 1. The plaintiff having entered into a written contract, must be bound by it; unless he can show fraud, or error caused by the act or omission of the defendants. 2. If there was such fraud or error, he should have rescinded the contract altogether, and sued for the whole value of the work. 3. But there is no evidence of fraud, nor of error. If there were any error, it was attributable to the negligence of the plaintiff. It appears, from the testimony, that he examined the ground. And he might have made an accurate estimate by the profile. 4. The profile is no part of the con-

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tract. It is not referred to in the contract. The contractor has access to it as an aid to his estimates; but there is no warranty of its correctness. If a specification at all, it is only such as respects the grade line which is drawn with reference to the tide level. 5. But if the profile were a part of the contract, it could not have misled the plaintiff. Not as to the amount of filling; for in this respect it is not pretended that it is incorrect. The only pretence is that the plaintiff was misled in taking an observation on the ground. But even this could not be true—for Columbia street was up to its grade at or near the intersection of Union-street. Nor as to the amount of earth to be excavated. If the surface had been changed, it could not have escaped the observation of the plaintiff, and the date of the profile should have put him upon inquiry. 6. No liability results from the alleged reference to Talmage and others. It was not an arbitration. The common council could not refer such a subject to others; and they did not, if they could. (*Bac Abr. Arbit. C. 21, E. 4, 13.*) If it was an arbitration, the action should have been on the award. (*Bailey v. Lechmere, 1 Esp. 377. Whitehead v. Tattershall, 1 Adol. & Ellis, 491.*) 7. There is no evidence of an account stated. 8. The referee has allowed for the pretended extra filling. In this, he is clearly wrong; for the profile itself would have precluded any error here. For the deficiency of earth, the award could not have exceeded \$300.

By the Court, STRONG, P. J. The contract signed by the plaintiff did not specify the level on which Union-street should be graduated. That ordinarily depends upon a profile on file in the office of the street commissioner. Such profile is generally exhibited to the contractors, and forms the basis of their estimates. The profile on file in the office of the street commissioner, at the time when the contract was made, was inaccurate. It represented the proposed level at the intersection of Union and Columbia-streets as eight feet above high water mark. The corporation had at first graduated the streets in that part of the city at that height, and drawn the profile accordingly;

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but had, a short time before making their contract with the plaintiff, concluded to raise such streets about six feet higher. No alteration, however, had been made on the profile. The change required a great addition of labor and materials in that part of Union-street lying between Columbia and Hicks-street, which had to be filled up. The profile also contained an inaccurate representation of the surface of the ground between Hicks and Henry-street. That was represented as considerably higher than the proposed level; whereas the earth had been recently removed, and that part of the street was not above the requisite height. The consequence of that was that the plaintiff was unable to procure the materials there, which he had expected, to fill up the adjoining cavities, and had to seek for them at a greater distance. The plaintiff discovered the discrepancies between the profile and the work which was required of him, soon after he commenced operations; and he thereupon applied to the street committee to be discharged from the contract, or to be allowed for the extra work. The committee refused to discharge him, but directed him to go on; and told him if he should have any claim for extra work he must present it after finishing the contract. And he accordingly proceeded, and finished the work. It is apparent, however, that there was a misapprehension as to the intended grade, or level, at the time when the contract was made. The plaintiff supposed that it was to be eight feet, the defendants that it was to be fourteen feet above high water mark. The defendants doubtless inferred that the profile had been altered so as to correspond with their last determination. That such alteration had not been made was attributed to them or their agent, and could not in any manner affect the rights of the plaintiff. It is true, he stated to one of the witnesses that in making his estimates he did not rely upon the profile, as he knew that was inaccurate; but he did not state any particulars except as to the representation of the surface of the ground: and it is apparent from all the testimony, that he must have supposed it to be substantially correct. As there is no pretence that he had been made acquainted with the last resolution of the common

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council, he had no other guide than the profile as to the proposed grade of Union-street. True, other contractors had commenced filling up the streets to the greater height, but they had proceeded with that work no farther south than to Degraw-street, which is the second north from Union-street. At that distance a spectator might not have ascertained that an elevation of six feet would raise the ground in Degraw-street above the existing level of Columbia-street where it crosses Union-street. At any rate it is evident that the plaintiff did not come to that conclusion.

If the profile constituted a part of the contract, then the plaintiff performed extra work for which he has a valid claim against the defendants. If, however, the contract was made in reference to the resolution of the common council to raise the grade of the streets in that vicinity, then, although the plaintiff may have miscalculated the work, greatly to his disadvantage, he could not, independently of the award, recover for the alleged extra labor from the corporation. Whether the profile was, under the circumstances, a part of the contract or not, was a question of fact for the referee to decide. There was testimony both ways; and if he came to the conclusion that it was, and the case turned upon that, his report should not be set aside as against the weight of evidence. But the plaintiff's claim rested, as I think, mainly upon the award. Both parties submitted the matter to arbitrators, a majority of whom were selected by the defendants. They awarded to the plaintiff \$787,88 for the extra work, and the defendants, at a subsequent meeting, virtually assented to the award by passing an ordinance to raise the money.

It is contended by the defendants that they had not the power to submit the matter to arbitrators. Without inquiring how far they may be estopped by their solemn acts and the consequent conduct of the plaintiff from raising this objection, I am clear that it is not well founded. By the 40th section of the act incorporating the city of Brooklyn, the common council are authorized to cause all the streets within the first seven wards (in which the street in question is situated) to be graded, levelled,

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gravelled and paved, to assess the expenses upon the owners of the lands benefitted, and to collect the money. This necessarily gives them the power to make the requisite contracts, and devolves upon them the duty of performing them on their part. It matters not for whose peculiar benefit the contracts are made, (although they are undoubtedly to a considerable extent for the benefit of the city :) the common council is a necessary party. The owners of the land are never parties. Indeed it is not absolutely ascertained who in particular are benefitted, until after the work has been commenced. The common council have then all the rights, and are liable to all the responsibilities of parties. They can agree to the compensation before, or after, the work has been performed. If payment is refused or deferred, they alone are sued. Assuredly no action could be maintained against the owners of the land. Where there is a capacity to contract, with a liability to pay, there is generally a power to arbitrate. (*Shelf v. Bailey*, 1 Comb. 183. *Weed v. Ellis*, 3 Caines, 254. 3 Esp. 101. 3 Barn. & Ald. 47.) The fact that one of the parties is a corporation, can make no difference. Corporations have all the powers of ordinary parties as respects their contracts, except when they are restricted, expressly, or by necessary implication. They have often arbitrated in cases where they are parties. Their capacity to do so has not, so far as I know, been heretofore questioned. One of the cases before us at the present term, (*The Mayor, &c. of New-York v. Butler*), (a) turned mainly upon an award where a corporation was a party. The validity of the award in that case was warmly disputed, but no objection was raised to the competency of the corporation to submit to arbitration.

An objection was also raised to the manner in which the arbitrators were appointed. That probably was based on the supposition that the acts of a corporation, to be binding, must be under their corporate seal. The submission to arbitration was by a resolution or ordinance adopted at a meeting

(a) *Ante*, p. 326.

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of the corporation. Their proceedings at their corporate meetings are not authenticated by seal, nor is it necessary that they should be. It is well settled, too, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all its contracts, whether sealed or unsealed, written or (through its agents) by parol, are valid. (*Bank of Columbia v. Patterson*, 7 *Cranch*, 299. *Mott v. Hicks*, 1 *Cowen*, 519.)

The submission may have been somewhat informal; but the form is a matter of indifference. It is sufficient if it appears from the acts of the parties that they intended to arbitrate, and that what should be done by the arbitrators should have the effect of an award. All that is very clear from the acts of both parties. The defendants referred the claim to three persons, two to be chosen by themselves and one by the plaintiff. Subsequently the report of those persons on the subject of the claim is presented to the defendant, and they direct money to be raised "in accordance with the report." The inference is that the whole was an arbitration, conducted by persons selected by the parties; and such inference arises from the recorded acts of the defendants.

But whatever objection there may have been either to the capacity of the corporation to submit to arbitration, or to the manner in which such submission was made, there can be no doubt as to their power to agree to pay for graduating their streets, whether before or after the work has been performed, and however, the amount may have been ascertained or determined. The resolution to add the sum reported due by the arbitrators to the assessment for the work, was substantially acknowledging the extent of the debt, and a promise to pay it. When assented to by the plaintiff, as it was, the claim became, if it had not been before, valid against the defendants to that extent. Of course the resolution could not then be rescinded except by the mutual agreement of the parties. The last resolution of the corporation was consequently inoperative.

The objection that the action was misconceived is also untenable. It is well settled that when there are no arbitration bonds, the transaction respecting the reference is considered as

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a statement of accounts between the parties, and an admission of the balance due. Therefore the award can be given in evidence under the money counts, and particularly as an account stated. (*Keen v. Batshore*, 1 *Esp.* 194. *Hays v. Hays*, 23 *Wend.* 363.)

The motion to set aside the report of the referee must be denied with costs, and the report must stand confirmed.

SAME TERM. *Strong and Morse*, Justices.

LIVINGSTON vs. KETCHAM.

Common of estovers cannot be divided, or apportioned. The reason is, that it would necessarily lead to surcharging the land from which they are taken.

Where the entire right to common of estovers devolves upon several persons, by operation of law, although they cannot enjoy it in severalty, nor either of them alone, it seems they may unite, and convey it to one person, who would thereby acquire a vested title.

But when it is once severed, by the act of the party, it is extinguished, and gone forever.

Where land, to which common of estovers is appurtenant, is partitioned by the act of the tenants, without any express stipulation as to the right to estovers, the right is extinguished, as to both tenants.

The separate occupation of distinct portions of such land, by the tenants, for a great number of years, is sufficient to raise the presumption of a division of the land between them, and of an apportionment of the right of common.

THIS was an action of trespass for cutting timber and trees on the plaintiff's premises, in the town of Dover, Dutchess county. The defendant pleaded the general issue, and gave notice that he had a right to cut wood and timber on the premises in question, by virtue of a lease executed by the father or ancestor of the plaintiff, to one John Wheeler, which had been assigned to the defendant and one Shadrach Sherman. The cause was tried at the Dutchess circuit, in 1847, before Bancroft, late circuit judge. The plaintiff proved the cutting of the

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wood and timber by the defendants. The defendant introduced a perpetual lease of about 100 acres, from Robert Livingston to John Wheeler, dated in 1772, reserving rents, and conferring upon the lessee the right to cut fire wood and fencing timber upon the lessor's wood lots, so long as it grew, and the land was wild and uncultivated. It was proved that, in 1790, Margaret Livingston, the widow of the lessor, and who owned the land in her own right, conveyed the farm previously leased to Wheeler, as well as the wood lots, to John R. Livingston, the plaintiff. John Wheeler died, leaving a son, Alburtis Wheeler, who occupied the farm 50 years ago, and was in possession 25 years. On the 23d of December, 1808, Alburtis Wheeler and wife executed an assignment of the lease given to his father, to Ketcham, the defendant, and Shadrach Sherman. On the 11th of March, 1809, the plaintiff, by deed, conveyed to John B. Wheeler the fee of the land above mentioned, and also the fee of another farm, formerly leased to said John B. Wheeler, containing, in all, about 200 acres; subject to the leases above mentioned. On the 21st of October, 1816, John B. Wheeler sold and conveyed to the defendant Ketcham about 54 acres of the farm held by Ketcham under the lease; being the north part thereof; and on the same day Wheeler executed another deed to Ketcham, conveying about 60 acres of land in fee; being the John B. Wheeler farm, the same lands now occupied by the defendants. Both these deeds expressly stated that the conveyances were subject to the estate and interest which the grantee then had, in the premises conveyed. The circuit judge charged the jury that there was no evidence of any apportionment of the Alburtis Wheeler farm, and that the right on the part of the defendant to common of estovers, without such apportionment, was good, notwithstanding his purchase of the fee of a part of the said Alburtis Wheeler farm; and that the defendant must have a verdict. The plaintiff's counsel excepted to this charge, and requested the circuit judge to charge (1.) That by the defendant's own act in purchasing the fee of a part of the farm, he extinguished his lease and tenancy; inasmuch as he had only a right in common with Sherman, and

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not the whole right, under the assigned lease. (2.) That the assignment of the lease to Ketcham and Sherman operated as an extinguishment of the right of common in the plaintiff's land. (3.) That common of estovers not being apportioned, and Ketcham having a lease of only one-half of the Alburdis Wheeler farm, neither he, nor Sherman, could claim the right of cutting. (4.) That the right in the defendant to cut, if any, was incident to the tenancy, and that when the tenancy ceased, in Ketcham, the right was gone. (5.) That the plaintiff was entitled to a verdict, if the jury were satisfied that the defendant had cut wood on the plaintiff's land. The judge refused to charge in this manner; and the jury found a verdict for the defendant. The plaintiff now moved for a new trial.

A. L. Pinney & John Thompson, for the plaintiff. 1. The purchase, by John B. Wheeler, of the fee of both farms, operated, (1.) As a merger of his own lease. (2.) To make him landlord to Ketcham, &c., so that he stood in the same relation to him, as Livingston did formerly to J. B. Wheeler. (23 *Com. Law R.* 147. 2 *Cowen*, 284, 830. 1 *Wend.* 478. 2 *B. C.* 177.) 2. By Ketcham's purchasing the fee of the north part of the Alburdis Wheeler farm, which is all he ever occupied, as is proved, (Sherman having a lease of and occupying the south part,) his lease was merged in the fee, and the right of cutting, &c. was gone. (10 *Wend.* 639. 2 *Hilliard's Ab.* 110, and references. 11 *John.* 495.) 3. By Ketcham's occupying the north part of the farm, and purchasing the fee of it, and Sherman occupying the south part for so great a period, the law presumes a division or apportionment between Ketcham and Sherman, consistently with their respective occupations of the leasehold estate; and apportionment extinguishes common. (2 *Wend.* 60. 10 *Id.* 639. 11 *John.* 495. 6 *Cowen*, 632.) The occupancy in severalty was per se an apportionment, and so was the taking a deed, by the defendant, of 54 acres, the north half of the farm. 4. Extinguishment results equally from Ketcham's owning and occupying the north half, under a lease to him and Sherman jointly. 5. If Ketcham owns the

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whole of the Albutis Wheeler farm, (which the conveyance shows he does not,) then there was a merger as to him of the lease when the fee was purchased. (16 *John*. 14. *Preston on Merger*, 100, 202, 205.) 6. Livingston's conveyance to J. B. Wheeler was subject to the terms of the lease. It conveyed no right to Wheeler in the wood lots; but only the farm. 7. The right to cut was incident to the tenancy, and when Ketcham ceased to be tenant and to pay rent, his right of estovers was gone; as he could have it only by keeping alive the lease. (11 *John*. 495.) 8. The question of apportionment was for the jury. (1 *Phil. Ev.* 165. 6. *Wend.* 228. 2 *Id.* 60, 61.) 9. If Ketcham's tenancy, or estate as tenant, was merged, then all incidents and qualities annexed will be extinguished. (*Preston on Merger*, 24, 49, 100.) 10. Ketcham, in any light, was, under his lease, a tenant in common with Sherman, and had a conditional fee, and when he acquired the fee simple in any portion of the same lands, there was a merger to the extent of the two estates in him, whether for the whole or a part. The right to cut was gone, (1.) By apportionment. (2.) By merger.

L. Maison, for the defendant. 1. There is no evidence that the plaintiff is the owner of the lands upon which the trespass is alleged to have been committed. 2. If the plaintiff be the owner, he cannot maintain trespass against the defendant for any wood or timber which may have been cut on lot No. 6; that lot being in the possession of Doty in virtue of a lease. (1 *R. S.* 741, § 8.) 3. There was no surrender of the lease, neither by writing nor by operation of law. (2 *R. S.* 135, § 6. 12 *John*. 361. 3 *Bac. Abr. Leases*, 8. 1 *Saund. Rep.* 235, c, n. 9. *Co. Litt.* 337, a, n. 2, 338, n. 2. 6 *Wend.* 580, 581. *Shep. Touch.* 300, 301, 303, 306. 2 *Wend.* 491. 18 *John*. 184. 16 *Id.* 28, 29. 6 *Wend.* 569, 579, 581.) 4. There was no extinguishment of the common. (4 *Cruise's Dig.* 114, § 73, tit. 23. *Id.* 116, § 8, tit. 23. *Cro. Eliz.* 570. 16 *John*. 27.) 5. There can be no rent reserved out of a common appurtenant. (*Cruise's Dig.* tit. 28, ch. 1, *Rents*, § 18 to 25. 2 *Bl. Com.* 41. 7 *T. R.* 651. *Cruise's Dig.* tit. 23, *Common*, § 88.) 6. The right of

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common is joint in Ketcham and Sherman. To extinguish the right, the joint act of both is necessary. There has been no apportionment of the estovers between them. 7. Ketcham's tenancy of the whole of the Alburtis Wheeler farm has not ceased. He is yet liable for the rent of that portion which has not been purchased by Ketcham of John B. Wheeler. 8. The exercise by Ketcham of the right to cut on these lots, uninterruptedly, for thirty-five years or more, (since 1808, the date of the assignment of the lease to Ketcham and Sherman,) with the knowledge of the plaintiff or his agent, and an acquiescence therein, is such a concession of the defendant's right that the plaintiff cannot now disturb it. (1 *Phil. Ev. notes* 308, 354. 1 *John. Ch.* 357.)

STRONG, P. J. The lease from Robert Livingston to John Wheeler, dated on the 9th of March, 1772, conveyed to the lessee, his heirs and assigns, a right to cut fire wood, fencing stuff and timber, for the use of the demised premises, from the waste and unimproved wood lots of the lessor, whilst they should continue in that state. Alburtis Wheeler, the son of the lessee, succeeded to his right in such premises, and on the 23d of December, 1808, assigned the lease to the defendant and one Shadrach Sherman. The defendant took possession of the north part, Sherman of the south part, and one Ensign of about twelve acres in the middle, of the leasehold premises; and they now occupy such parts in severalty. How long they have so occupied them does not appear, but it is in evidence that the defendant has alone possessed the north part for upwards of 35 years. During the greater part of that period he has cut wood, fencing stuff and timber, for the use of the land occupied by him, from the waste and unimproved wood lots of the landlord, the title to which has in the meantime passed from the lessor, through his widow, to the plaintiff.

The defendant's right to cut the wood in question, notwithstanding his exercise of it for so long a period, must depend upon the lease to John Wheeler; as he has uniformly claimed under that instrument. That precludes him from claiming, by

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prescription, estovers for the land actually occupied by him. Prescription raises the presumption of a grant only where none is expressly proved. The principal, and in my opinion the controlling question, in the case, is whether the claim now presented by the defendant can be supported by the original grant.

It seems to be well settled that common of estovers cannot be divided or apportioned. The reason given is, that it would necessarily lead to surcharging the land from which they are taken. More fuel, fences and buildings would be requisite for a number of tenants than for one. It is not necessary to inquire, at this late day, whether the quantity necessary for one tenant could not have been reasonably ascertained, and that divided among the several new tenants, agreeably to the extent or value of their respective parts of the land. It is sufficient, for the present, to say that the rule which I have mentioned has been settled. Lord Coke says that the right to take estovers is so entire that it cannot be divided, even between coparceners. (*Co. Lit.* 164, b.) It appears by the books that in such case the eldest shall have them and the others, a contribution; or if no other property descended, from which contribution could be had, then the parceners should have the alternate enjoyment. It seems to be settled that, when the entire right devolves upon several *by operation of law*, although they cannot enjoy it in severalty, nor either of them alone, they may yet unite and convey it to one; who would thereby acquire a vested title. But when it is once severed by the act of the party, it is extinguished and gone forever. The question in this case is whether the right to take the estovers has not been severed by the act of the party.

The defendant confessedly occupies but a part of the demised premises. He claimed in his notice subjoined to his plea that *he* had a right to cut the wood and timber under the lease. He does not claim under a joint right in his co-assignee Sherman and himself. Had they occupied the whole jointly, and he had justified under a joint claim, then the question might have been raised whether an assignment, in terms, of the right by one to several would, *per se*, have annihilated it. In that

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case it might well be doubted whether the same reason—the danger of surcharging the common—could not be urged against the continuance of the right as well under such circumstances as in the case of tenants holding in severalty, although not to the same extent. There would be a necessity, certainly, for more fire wood, and probably for more fencing stuff and building timber. However, it was not necessary to decide that point on the trial of this cause. It could, and I think should, have been put on another ground. There was strong, if not conclusive, evidence to prove that there had been a partition of the demised premises between the defendant and Shadrach Sherman, under the assignment of the original lease to them. Such partition would have been valid and have created separate interests in the parties, although made by parol.

There is no evidence to show that the right to take estovers was in any manner granted or conveyed to the defendant to be exercised by him solely. On the contrary, the presumption from the facts proved is the other way. It was incumbent upon the defendant to remove such presumption by positive proof; more especially as nothing is to be presumed in favor of the claim to take estovers. If there has been a partition of the premises without any express stipulation as to such claim, that of course extinguished the right to take the estovers in question, and the defendant was a trespasser. In my humble opinion the learned judge should so have instructed the jury. The intimation which he gave, and his refusal to charge on this point as requested by the plaintiff's counsel, doubtless led them to a different conclusion.

There should be a new trial, costs to abide the event of the suit.

MORSE, J. concurred.

New trial granted.

SAME TERM. *Strong, Morse and Barculo*, Justices.

WILLINK *vs.* VANDERVEER.

The defendant, and B. contracted with N. for the purchase of a farm of about 100 acres belonging to him at F., at the price of \$350 per acre. Prior to receiving a deed therefor, the defendant applied to the plaintiff and one V. to join him in the purchase of lands at F.; to which they assented, and authorized him to make the purchase for their joint benefit and account, on the best terms he could. He then contracted with S. & S. for the purchase of 52 acres more at \$300 and \$250 per acre. This purchase also included certain wood and meadow lands. Subsequently the defendant represented to the plaintiff and V. that he had effected a purchase of lands from N. and from S. & S. at the prices of \$400 and \$350 per acre, on the joint account; concealing from them the fact that he, together with B., already had contracts for the land, and concealing from them also the fact of the purchase of the wood and meadow lands. The plaintiff and V., relying on the representations of the defendant, as to the price at which the lands were bought, paid to him their respective portions of the cash payments required to be paid, and of the expenses attending the purchase. The conveyances of the lands purchased were taken in the name of the defendant. When the deeds were executed, false considerations were inserted therein, for the purpose of carrying out the deception practised upon the plaintiff and V. The result was that of the lands which were contracted to be purchased by the defendant and B., for about \$45,000, two-thirds were sold to the plaintiff and V. at the rate of upwards of \$58,000, after reserving to the defendant the meadow and wood lands; which the defendant conveyed to B. without the knowledge of the plaintiff and V. Upon a bill filed by the plaintiff, praying for an account, and for payment to him by the defendant of all sums paid to the defendant by the plaintiff, over and above his share or proportion of the actual purchase money of the premises; and for an account of the avails of the wood land and meadow, and for the payment, to the plaintiff, of an equal share thereof; *Held*, that the defendant acted as the *agent* of the plaintiff and V. in consummating the purchase; and that as such agent he had no right to become himself the seller, or to make a profit out of his principals.

Held also, that the plaintiff was entitled to an account of the profits made by the defendant, out of him, on the purchase of the premises, including the value of the wood land and meadow, and to a decree for the re-payment of the excess of monies paid by him over and above his proportion of the price paid by the defendant for such premises, with interest; and that in ascertaining such excess, the defendant should be charged with the value of the wood land and meadow.

If a party makes a false representation to another person who is about to act upon the faith of that representation, the former must make the representation good, if he knows it to be false.

Where a party, intentionally, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an

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undue advantage of him ; in every such case there is a positive fraud, in the truest sense of the term.

Where a party files a bill against another for an account and payment of moneys obtained from him by the latter, upon pretence of paying for lands purchased on joint account, in pursuance of a parol agreement between the parties, but which moneys were not in fact applied for that purpose, the defendant cannot set up the objection that the agreement under which the lands were purchased was by parol, and therefore void by the statute of frauds.

Where the plaintiff's claim rests upon actual fraud, such fraud may always be proved by parol ; even to avoid the statute of frauds.

IN EQUITY. This was an appeal from a decree of the former assistant vice chancellor of the first circuit, dismissing the plaintiff's bill. The nature of the case, and the facts therein as stated in the pleadings, and established by the proofs, appear sufficiently from the opinion of the court. The bill prayed for an account and for payment by the defendant to the plaintiff, of all sums paid to him by the plaintiff over and above his share or proportion of the actual purchase money of the premises ; and also for an account of the avails of the wood land and meadow, and for the payment to the plaintiff of an equal share thereof ; or that the value of such wood land and meadow might be deducted from the sum actually paid for the farm, wood land, and meadow, and the balance only charged on the land conveyed to the defendant by J. and M. S. Neefus ; and for general relief,

John A. Lott & D. B. Ogden, for the plaintiff. 1. The purchase made by the defendant was for the joint and mutual benefit of himself, the plaintiff, and Joaquim Jose Vasques. 2. But even if the purchase of the property were originally on the sole account of the defendant, yet the nature and circumstances of the transaction between the defendant and the plaintiff, entitles the latter to the same relief as if the purchase had been made on joint account of the plaintiff, the defendant, and Vasques. 3. The agreement charged in the bill between the plaintiff and the defendant was not an illegal one, and is not against the policy of the law. 4. The plaintiff is entitled to a decree for an account by the defendant, and for re-payment of

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all moneys paid to him by the plaintiff on account of said purchase, over and above the plaintiff's share of the purchase money, with interest. 5. The plaintiff is also entitled to the payment of the equal one-third part of the price for which the two pieces of wood land and meadow were sold, by the defendant, with interest. 6. The decree of the assistant vice chancellor ought, therefore, to be reversed, with costs, and a decree ought to be made in conformity with these principles.

W. Rockwell, for the defendant. The transaction, as set forth in the plaintiff's bill, and forming the gravamen of his charge, is illegal and against the policy of the law, and ought not to be enforced. The plaintiff's charge, as set forth in the bill, is untrue in fact, and is not supported and established by the evidence. The evidence shows, positively, that the premises in question were purchased upon an understanding and arrangement that T. J. and C. J. Bergen were to be interested in the purchase, and that the premises were to be held by the defendant for their benefit, to the extent of two-thirds of the estate, and interest therein, and not for the benefit of the plaintiff and Vasques; and that the latter came in as subsequent purchasers from the defendant.

By the Court, BARCULO, J. The case presents for our consideration two questions; one of fact, and one of law.

The first is, whether the defendant, by false and fraudulent representations, obtained and appropriated to his own use, several thousand dollars of the plaintiff's money. To decide this, it will be necessary to look carefully through the pleadings and proofs.

The bill states that in the spring of 1835, the defendant applied to the plaintiff and one Vasques to join him in the purchase of certain lands at Flatbush. To which they, confiding in his judgment, assented, and authorized him to make the purchase, for their joint benefit and account, on the best terms he could. That the defendant, a few days thereafter, informed them that he had bought a farm of John and Michael

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Neefus, containing about 100 acres, for \$400 per acre; one half of the purchase money to be paid in cash or notes, and the other half, secured by bond and mortgage on the premises. That about the same time the defendant negotiated the purchase of about 40 acres of one Stephen B. Schoonmaker, and 12 acres of Cornelius Suydam, and represented that the price to be paid therefor was \$350 per acre. That the deeds of said lands, by an understanding among the parties, were taken in the name of the defendant. That the plaintiff and Vasques, relying on the good faith of the defendant, advanced and paid to him their respective portions of the cash payment required to be paid, and of the expenses, &c., incident to the purchase. That the defendant, in addition to the lands conveyed to him by Neefus, bought, as a part of the same purchase, two pieces of wood land and two pieces of salt meadow, of considerable value, which the defendant caused to be conveyed to his brother-in-law, Bergen, without the knowledge of the plaintiff and Vasques, and with the view of defrauding them. That, after an ineffectual attempt to sell the premises at auction, as building lots, a partition was made, and the defendant conveyed to the plaintiff his proportion of the property; he assuming a due proportion of the bonds and mortgages, which he afterwards paid. That the plaintiff, within three months before filing the bill, first discovered that the defendant had practised a fraud upon him, and that the price of the Neefus farm was in fact but \$30,000, instead of \$40,000, including the wood and meadow land; of which \$10,000 only was paid in cash, and the remaining \$20,000 secured by bond and mortgage. And that the defendant had fraudulently procured the sum of \$40,000 to be inserted in the deed as the consideration, to deceive and defraud the plaintiff. That the defendant, instead of paying \$350 per acre to Schoonmaker, as represented by him, had paid only \$300; and that the defendant requested Schoonmaker to insert a false consideration in like manner, in the deed. That, instead of paying Suydam \$350 per acre, the defendant paid only \$250 per acre, and the larger sum was put

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into the deed as the consideration, by the contrivance of the defendant, to defraud the plaintiff.

The answer, which was put in without oath, stated that the defendant and his brother-in-law, Bergen, became the purchasers of the said lands, in the spring of 1835; the defendant having an interest of one-third, and said Bergen the remaining two-thirds; that after thus purchasing, the defendant and Bergen concluded to sell, and that the defendant informed the plaintiff "accidentally," that he had purchased the property, and was willing to sell it at \$400 an acre; that the plaintiff thereupon requested him to sell him a part of said lands, and said that he should like to have one-third for himself and one-third for his friend Vasques; that they had means, and would build on and improve their portions, and thus enhance the value of the residue: that after other interviews, and after the plaintiff and Vasques had examined the premises, the defendant sold them each one-third; the Neefus farm of 100 acres, at \$400 an acre, and the rest at \$350 an acre. The answer expressly denied that the defendant ever informed the plaintiff, or Vasques, what he had given for said lands, or made any false or fraudulent representations to either of them in relation thereto.

The testimony, at first view, seems to be conflicting; but is easily reconciled. The apparent conflict arises from the circumstance that the counsel who examined the witnesses were aiming at an immaterial issue; the establishment of which, on the part of the plaintiff, was wholly unnecessary, if not fatal; and on the part of the defendant, would not make out a defence. That issue was, whether the premises had been purchased before the interview between the plaintiff and the defendant, in relation to the plaintiff's becoming interested therein. Upon this point, I think the evidence preponderates in favor of the defendant: although the opinion of the vice chancellor assumes the facts to be as set forth in the bill.

The material branch of the inquiry is, whether the defendant proposed to the plaintiff to join in the purchase of these lands, and a few days thereafter represented to him that he had

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effected the purchase at the prices of \$400 and \$350 per acre; and thus obtained from him his share of the purchase money at those rates. And this part of the case, I think, is established in favor of the plaintiff. Vasques testifies that it was proposed by the defendant, that he and the plaintiff should join him, and he would purchase it and have all the trouble of the transaction. Soon after that, he says, "the defendant said he had bought the Neefus farm at \$400 an acre, and we made the payment accordingly." The other lands were bought on joint account, and for the same purpose as the lands bought of Neefus. He reported the purchase; he told the parties he had bought at \$350 an acre. He told Vasques he had bought the land of Neefus, at \$400 an acre, on the joint account. He told Vasques and the plaintiff he had bought the land of Schoonmaker and Suydam, at \$350 an acre, for the same concern. The testimony of Hoskins confirms the statement of Vasques.

I am unable to discover any evidence that seriously controverts this view of the case. There is, to be sure, some discrepancy as to dates. Vasques thinks the first payment made by him was on the 13th or 14th of April, and that the first interview was a very few days before. On the other hand, Neefus thinks the first payment of \$2000 was made somewhere about the 8th, 9th or 10th of April; that Bergen and the defendant wanted four or five days after the bargain to pay it in. Bergen also says the payment of \$2000 was made by him to Neefus about the 7th or 8th of April, and before the parties went to view the premises. Supposing it to be conceded that the defendant's witnesses are right in this respect, let us see how it affects the case.

It appears, then, that the defendant and his brother-in-law, Bergen, had become the purchasers, by contract, of this farm, within the first two or three days of April, for \$30,000, including the wood land and meadow. In about a week after, the defendant went to the plaintiff and Vasques and induced them to join him in a pretended purchase of the farm, without the wood land and meadow, for \$40,000; and by representing that he paid Neefus that sum, obtained the like proportion from

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them. If therefore it be true, as contended by the defendant, that the purchase was made the first of April, then, if Vasques is to be believed, although mistaken as to the precise day, the defendant was guilty of an outrageous falsehood when he pretended to the plaintiff and Vasques that he had not purchased, but thought he would purchase, and subsequently that he had purchased, for \$400 an acre. It is therefore a matter of very little consequence *when* the purchases from Neefus, Schoonmaker and Suydam were made. If the defendant had already become the owner when he proposed to the plaintiff and Vasques to join him in the purchase, he is as guilty of a fraud upon them, as if he subsequently purchased, and deceived them as to the amount paid for the land. In either case, he obtained from them money by false and fraudulent representations as to the price of the land.

The insertion of a larger consideration than the true one, in the deeds from Neefus and Suydam, is a circumstance which, if standing alone, would not be entitled to much weight. But it is certainly somewhat remarkable that the consideration inserted corresponded precisely with the amount of the purchase money, as represented by the defendant to the plaintiff and Vasques. I cannot resist the conclusion that this was a part of a skilfully contrived scheme of keeping the other parties in the dark as to the true amount of the purchase money.

Another circumstance which strengthens the case for the plaintiff, is found in exhibits Nos. 3 and 4. They are accounts, in which the defendant charges the plaintiff with one-third of certain expenses, which were paid by the latter. Among these are charges for recording the deeds from Neefus, Schoonmaker and Suydam; "Bonus to Neefus, \$125;" and the price of a gown to Mrs. Schoonmaker, probably for releasing her inchoate right of dower. I am unable to reconcile this testimony with the case as set forth in the defendant's answer. If he and Bergen had become the purchasers, and sold out a third to the plaintiff and a third to Vasques, why should the latter be charged with the recording of the deeds to the defendant? What has the plaintiff to do with paying Neefus a bonus of

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\$125? Why should he bribe the married women to get them to sign the deeds? If the plaintiff purchased of the defendant, it was his business to obtain and perfect his title, at his own expense.

The view of the case with which the testimony is all reconcilable, and which I deem the true one, is this. The defendant and Bergen contracted for the Neefus farm in the fore part of April, 1835. Pending the negotiation and before the deeds were given, the defendant saw the plaintiff and Vasques, and induced them to join him in his proposed purchase. For the purpose of speculating out of them, he concealed the fact that he already had a contract, and pretended to purchase on joint account, at an increased price. This price was fixed as high as he supposed, or ascertained, the others would pay. In the mean time the Schoonmaker and the Suydam lands were obtained in the same manner. When the deeds were executed, a false consideration was inserted, to carry out the deception. And the property being considered as purchased for the benefit of all three, each one properly paid one-third of the expense of obtaining the title, including presents, bonus, recording fees, &c. The result of the operation was that the land, which had been bought for about \$45,000, was put off upon the plaintiff and Vasques at the rate of upwards of \$58,000, reserving to the defendant and Bergen the meadow and wood land: the latter of which was subsequently sold for the nominal sum of \$7000, although probably not more than half that amount was realized. The question of *fact*, therefore, with which we started, is answered in the *affirmative*.

The remaining question, of *law*, is, whether such a state of facts entitles the plaintiff to any relief. There can be no doubt that the representations, by which the plaintiff was induced to embark in this speculation, were of the character denominated *fraudulent*, as distinguished from those which are merely *false*. They were made in a matter of business, in which the defendant assumed to act as agent for the others, in which he had peculiar means of knowledge, and in which the representations were fortified by the deeds in such a manner as to deceive a man of ordinary care and prudence. It is said to be a very old

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head of equity, that, if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knows it to be false. (*Story's Eq.* § 191. *Evans v. Bicknell*, 6 Ves. 173.) When the party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud, in the truest sense of the terms. (*Stor. Eq.* § 192.)

By applying these well settled and familiar principles, there is no difficulty in giving relief in this case. But it is said by the defendant's counsel, and by the learned assistant vice chancellor, who decided this case originally, that there are insuperable legal objections to the plaintiff's right to recover, arising, (1.) From our statute in regard to trusts. (2.) From the statute of frauds. We think these statutes have no manner of application to the case, regarded as it must be, as a case of *actual fraud*. It must be admitted, however, that the case as argued by the counsel, and as presented most prominently in the pleadings, would admit, to some extent, the application of those statutes, and naturally lead to the train of reasoning set forth in the opinion of the court below. They reason thus in regard to the first of the above named statutes. 'The plaintiff paid his money under an agreement that the deed should be taken in the name of the defendant; this agreement is illegal and the absolute title vested in the defendant (1 R. S. 728, § 51.) The plaintiff could not have compelled the defendant to convey one third to him; nor can he recover back any portion of the money paid by him.' The defect in this reasoning consists, in assuming that the plaintiff shows no title to relief, *except through the agreement*. So far from this being the fact, the plaintiff derives no aid from the agreement, at all. It may be entirely laid out of the case, without impairing his rights. Supposing, for instance, that the agreement had been, that the title should be taken in the names of all three—which would have been a valid agreement—the plaintiff's claim to redress would have been the same as it now is. In both cases it

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would depend *not upon the agreement, but upon the fraud* of the defendant, by which he obtained the plaintiff's money, under the pretence of paying for land, and then put it into his own pocket. It matters not, therefore, what the agreement was, nor in fact whether there was any specific agreement whatever.

Again, it is said, "It is no more a fraud than the case of a man taking a deed to himself, when another has paid the money, and then holding it against that party." *That* is no fraud; because the statute *legalizes* it. But, in order to make the cases more similar, suppose the party taking the deed *obtains* it by art and deceit, or without the consent of the person paying the money, could there be any doubt that equity would relieve.

Now in the case before us there is no dispute between the parties as to the title, nor as to the purchase money paid for the lands. The plaintiff merely claims the moneys obtained by the defendant, under *pretence* of paying for the lands, but which were not in fact applied for the purpose.

In regard to the statute of frauds, it is contended that this agreement, that the defendant should purchase, and the plaintiff have an interest in the lands, cannot be proved by *parol*. This might be so, if the plaintiff was seeking to *enforce* the agreement, and obtain his share of the land. But this is not the case. The agreement has been performed by both parties. The agreement is fully executed. It is upon *actual fraud* that the plaintiff's claim rests—and that may always be proved by *parol*, even to avoid the statute of frauds. (*Story's Eq.* § 330.)

There is another principle of law upon which this case may rest safely. It is thus laid down by Mr. Paley. It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell, cannot make himself a purchaser; nor, if employed to purchase, can he be himself the seller. (*Paley on Agency*, 32.)

It appears, from the direct testimony of Vasques, as well as the circumstances of the case, that the defendant assumed to act as *agent* for the others, in consummating the purchase.

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If then it be true, as he states, that he and Bergen had already obtained a contract for the lands, the defendant became the *seller* to his principals, of his own land, instead of purchasing from others, according to the terms of his agency. It is unnecessary to cite further authorities to show that this is wholly inconsistent with the character of an agent. It is too plain to require an argument, that an agent whose duty it is to buy on the best possible terms for his employer, cannot consistently sell his own property to him. There must be a conflict of interest, in such a case.

Let us rather look into the authorities and see what remedy courts of equity give the principal against his unfaithful agent. The rule seems to be that the agent is held accountable for the *profit* he makes by thus dealing with his principal. This principle is recognized by Lord Thurlow in *East India Company v. Henchman*, (1 *Ves. jun.* 289,) where a bill was filed by the company against one of their servants, for an account of profits, made by supplying the company with silks under a collusive contract with the board of trade. "If," says he, "being a factor, he buy up goods which he ought to furnish as factor, and instead of charging factorage duty, or accepting a stipulated salary, he take the profits and deal with his constituent as a merchant, this is a fraud for which an account is due." So in the case of *Massey v. Davies*, (2 *Ves. jun.* 317,) an agent employed to furnish timber for a colliery was decreed to account for the profits, made by selling his own timber to his principals under the name of another person, with whom he had secretly engaged in partnership.

This rule seems to be just and equitable. Applied to the present case, it entitles the plaintiff to an account of the profits made by the defendant out of the plaintiff on the purchase and sale of the premises in question, including the value of the wood land and meadow. In other words, the plaintiff is entitled to a decree against the defendant for the repayment of the excess of moneys paid by the plaintiff, over and above his proportion of the price paid by the defendant for said premises, with interest thereon; and in ascertaining such excess, the defendant

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is to be charged with the value of said wood land and meadow.

A decree must, therefore, be entered, *reversing* the decree of the assistant vice chancellor, with provisions in conformity to the above principles, *with costs*.

ONONDAGA SPECIAL TERM. November, 1847, *Gridley*,
Justice.

DENNISON, adm'r, &c. *vs.* ELY and others.

In 1819, J., being the owner of two lots of land, executed a warranty deed thereof to D. E., which deed was recorded in Nov. 1840. The consideration expressed in this deed was an exchange of lands. D. E. continued to own and possess the lots for about 20 years after the conveyance thereof to him. In 1823, J. executed another warranty deed of the same lots to P. E., the wife of D. E.; which deed was recorded on the 2d of May, 1840. The consideration stated in this deed was an exchange of lands lying in Ohio, being part of the patrimonial estate of the grantee, and \$100. The consent of D. E. to the giving of this conveyance to his wife, and his active agency in effecting it, appeared from the fact that the deed was in his hand-writing. The grantor in this deed covenanted to *warrant the premises against all persons* claiming under, by, or through himself, and against his own acts. On the 22d of May, 1840, D. E. conveyed the same land to his son W. M. E. And on the 9th of Sept. 1840, after the death of P. E., D. E., together with the several children of himself and P. E. his wife, executed to A. S. conveyances of the land, for the sum of \$12,600; \$6,600 of which was paid to the creditors of D. E. and the balance was secured by separate obligations to his children.

In 1842, after the death of J., D., the administrator of J., recovered a judgment against D. E.; and an execution having been issued upon that judgment, and returned unsatisfied, D. filed a creditor's bill against D. E., the judgment debtor, A. S., the purchaser of the land, and the children of D. E., charging therein that the deed executed by J. to P. E. conveyed no title to her, inasmuch as the same land had been previously conveyed to D. E., and was then held by him, under his deed, and praying that the land, in the hands of A. S. might be appropriated to the payment of the plaintiff's judgment; or that the amount of the notes given S. to the children of D. E., for the purchase money, might be appropriated purpose, and especially, that the part remaining unpaid of one of the notes

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given to a daughter of D. E., who died before the whole was paid, might be so applied :

- Held*, 1. That it was competent for J., the grantor, by the agreement and consent of D. E., to convey the same land to a third person, for a valuable consideration, which he had previously conveyed to D. E.
2. That D. E. consenting to, and aiding in, such new conveyance, would be estopped, in equity, from setting up his prior legal title against the defective title of the second grantee.
3. That the fair presumption was, that it was agreed between D. E. and J., that the lots should be deemed to be restored to J., and that the same should be conveyed to P. E.
4. That upon the same principle on which a court of equity would interfere to prevent D. E. from asserting his legal title, against a third person who had been induced by him to part with his money for the estate, it would protect the title of P. E., in her heirs, against her husband, and those claiming under him, if in truth her property formed the consideration of the conveyance to her, even if she had notice of her husband's prior deed.
5. That P. E. was to be regarded as a bona fide purchaser without notice.
6. That if A. S. purchased the premises, relying on the truth of the recital in the deed to P. E., that the latter had advanced the consideration out of her own property, the grantor would be estopped from denying it; upon the well settled principle relating to an estoppel *in pais*.
7. That J., and the plaintiff as his administrator, were estopped from alleging that the deed to P. E. conveyed no title to her, and from setting up a title as against her, derived under the prior deed to P. E.
8. That the case came within the general rule, that an executor or administrator can only maintain such claim as the testator or intestate might have successfully adopted while living.
9. That it must be assumed, as between the parties to the suit, that when A. S. purchased the farm, it was owned by the children and heirs of P. E., subject to the life estate of D. E. therein, as tenant by the curtesy.
10. That the plaintiff could not reach the land in the hands of A. S., by his creditor's bill, and have it appropriated to the payment of his judgment; nor the amount remaining unpaid upon the note held by the deceased daughter of D. E., at the time of her death.

Where a deed conveyed to the grantee the land therein described, in fee, together with all the estate, right, title, interest, claim and demand whatever of the grantor, either in law or equity of, in, and to the premises; *Held* that it was the intention of the grantor to convey the land, and that this clause was not to be regarded as a mere release or quit-claim, or as inserted with any purpose to limit the grant, but as used for greater caution, to embrace any claim or title, equitable as well as legal, which the grantor might have in the land.

The *habendum* clause, in a deed, may enlarge, abridge, or explain the premises.

The cancellation, or re-delivery, of a deed, with the view of re-investing the grantor with the title, will not have that effect.

How far recitals in a deed operate by way of estoppel.

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It seems that the grantor in a deed is estopped, by a recital therein of a specific consideration moving directly from the grantee, from denying that fact. But if such a recital does not estop the grantor, as to the fact recited, the evidence to controvert it should be of such a character as clearly to disprove it.

IN EQUITY. The bill in this case was a creditor's bill, filed by the plaintiff, as administrator with the will annexed of David Judson, deceased, against David Ely, the judgment debtor, and against the other defendants, to reach property of the debtor, alleged to be in their hands. It set forth the recovery of a judgment in the supreme court of this state, for the sum of \$36,083.89, on the 19th day of December, 1842, and the issuing, and return of an execution unsatisfied, against the defendant David Ely. The bill then stated that Judson, the testator, executed to the said David Ely, a warranty deed of lots 32 and 40 in Brighton, Monroe county, on the 19th of August, 1819, which deed was recorded on the 18th day of November, 1840; and that Ely continued to own and possess this Brighton farm, for about 20 years after the conveyance of the same to him; that after the execution of the said conveyance and on the 2d day of October, 1823, Priscilla Ely, the wife of the said David, obtained from the said David Judson another warranty deed of the farm, executed to herself, which was recorded on the 2d of May, 1840. This last deed was charged, in the bill, to have conveyed no title to Mrs. Ely, *inasmuch as the same land had been previously conveyed to David Ely, and was then held by him under the first mentioned deed.* The bill further showed that on the 22d of May, 1840, David Ely conveyed the same land to his son William M. Ely, and that afterwards, and on or about the 9th of September, 1840, David Ely, together with his several children who were also the children of the said Priscilla, (who had died many years before,) executed to Azariah Smith, conveyances of the farm for the entire consideration of \$12,600; that \$6,600 of this consideration was paid by discharging the debts of David Ely, and the remaining \$6000 was secured by separate obligations, to the children of Mrs. Ely, in pursuance of a contract between the parties. All of these deeds of David Ely

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and his children, were charged to be fraudulent and void against the testator, and against the plaintiff's judgment. And as evidence of the fraud, it was charged that the purchase by Smith, of the farm in question, was for much less than its actual value; that David Ely was insolvent at the time, and owing a large debt to the plaintiff's testator, which had been due many years; all which was well known to Smith. The bill claimed that the farm should be declared to be liable to be appropriated to the payment of the plaintiff's judgment, or that the amount of the outstanding notes to the children should be so appropriated, and especially that the part remaining unpaid, of one of the notes executed to a daughter of the said David and Priscilla Ely, who died before the whole was paid, should be paid towards the discharge of the judgment. The cause was heard on pleadings and proofs.

One ground of the defence relied upon by the defendants, rested upon the proposition that Priscilla Ely became the owner of the farm, by virtue of the conveyance to her, of the date of October 2d, 1823; and that the farm descended, on her death, to her children, subject to the life estate of David Ely, as tenant by the curtesy; and that Smith took the interests of all the parties, and paying to each heir such portion of the purchase price of the farm as was agreed upon; the heirs consenting that a much larger share than belonged to their father, should be paid and allowed in the discharge of his debts.

E. Pearson & B. Davis Noxon, for the plaintiff. I. The plaintiff is entitled, as against David Ely, to a decree for the amount of his judgment stated in the bill, and interest. The pretended settlement set up in the answer is not proved, but on the contrary is disproved. Besides; it should have been set up against the notes. II. The plaintiff is entitled to the Brighton farm, or the actual value of it. All the deduction the defendants can claim is the balance, after applying D. Ely's property to pay off bona fide liens on the farm older than the plaintiff's judgment. All the sales or liens made by the defendant Smith were not bona fide. D. Ely's deed was known to Smith. It was re-

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corded prior to any such sales or liens. III. The entire amount of the defendant Smith's obligations to D. Ely's children, with interest, should be decreed to be paid to the plaintiff. Elizabeth's portion, with interest, belongs to her father, D. Ely. IV. The plaintiff is not estopped by the deed to Mrs. Ely. He sues as administrator; and is not proved to have assets. And the deed is void as to creditors, for fraud and want of consideration. The deed to Ely was a full covenant warranty deed, and all the interest subsequently acquired by the grantor enured to that title. The testator, at the time of the deed to Mrs. Ely, was not in possession, and had no title, and could therefore convey none; or if any interest did pass, that is no estoppel. Her husband was in possession under his deed, and Mrs. Ely knew it. Mrs. Ely's deed gives her no remedy by action in case of failure of title, and therefore it estops no one. Mrs. Ely's deed is also void for champerty. V. No one claiming under Mrs. Ely's deed can be a bona fide purchaser, as against her husband or those claiming under him. Mrs. Ely cannot. Neither can her children; nor Smith, for he knew of D. Ely's deed. Notice of D. Ely's deed is not sufficiently denied. Neither are seisin and possession in Judson alleged, nor that Smith has paid the purchase money. Mrs. Ely paid nothing for the farm; nor for the subsequently acquired titles or claims. D. Ely possessed it as his, under his deed, and owned it, nor was he disseised by election, or requested to give up possession. And his object in keeping it in others was to defeat creditors. Accordingly, all the deeds that are set up to defeat our debt are void as to that debt. And we, being creditors, can at least take any ground that D. Ely's deed and possession would have entitled him to take, had his wife been a stranger to him.

J. R. Lawrence, for the defendant Smith. I. Smith's purchase of the lots was a bona fide purchase, without any intent to delay, hinder, or defraud creditors. David Judson received a large portion of the purchase money from Smith, on his judgments against David Ely. He thereby sanctioned the sale to Smith, and his administrator is now estopped from setting up

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that Smith's purchase was fraudulent. Smith's object and intent was to purchase the lots at a fair price, to secure his own debt and to pay the other debts of David Ely; and at the time of his purchase he expected to pay all the debts of David Ely. And it was the understanding of all parties, that, if Judson's judgment against David Ely was paid, the plaintiff's testator was to give up the balance of his claim against Ely. It was just and equitable that Ely's debts, where he lived and did business, should be first paid, if only one could be paid; because Judson, by keeping his claim out of sight, gave Ely a credit he otherwise never could have had. It is a principle of equity, that where one of two innocent persons must suffer by the wrongful act of a third party, the one who, by his negligence, has enabled such third party to do the injury, must himself bear the loss occasioned thereby. (9 *Paige*, 52.)

II. Whether the title to these lots was in David Ely alone, or in David Ely and his children, Smith has the title of all and each of them; for they all conveyed to him. III. Judson, and the plaintiff as his administrator, are estopped from setting up that the deed with warranty from Judson to Mrs. Ely was void, or that it conveyed no title. 1. If the deed from Judson to Mrs. Ely was fraudulent and void as against other creditors of David Ely, yet Judson, although he be a creditor, cannot set up that fraud; for he was a party to the deed. (*Osborn v. Moss*, 7 *John*. 161. *Hawes v. Leadu*, *Cro. Jac.* 270. 4 *Mass. Rep.* 354. 9 *Pick.* 93. 20 *Id.* 247. 12 *Id.* 89.) 2. If Judson's deed to Mrs. Ely conveyed no title to her, then the heirs of Mrs. Ely can recover of the plaintiff as administrator of Judson, on the covenant of warranty contained in that deed. This shows the impropriety and fallacy of permitting Judson to avoid his own deed in this suit, merely to turn the heirs of Mrs. Ely, the grantee, around to their action against his representatives, upon the covenant of warranty. IV. The deed from Judson to Mrs. Ely was a valid deed; for after his first conveyance to David Ely of these two lots, he received another conveyance of an outstanding title, which conveyance was procured by the separate individual patrimonial property of Mrs. Ely; and she

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having died, a life estate only remained in David Ely, and the remainder in his heirs. David Ely being cognizant of the deed from Judson to Mrs. Ely, could not set up his former title. Judson surely cannot take advantage of his having given a previous deed, for the purpose of defeating his second deed, and thereby reap a benefit from his own wrong, if it be a wrong. V. Whether the amount agreed to be paid to the heirs of Mrs. Ely was legally due to them, or not, Smith supposed, and honestly believed, they were entitled to it; and if he paid them without any intent to defeat, hinder, or defraud the creditors of David Ely, it will not affect the validity of his deed, although it should turn out that he was mistaken. All fraudulent intent is positively denied by Smith in his answer. The heirs would not convey their title without payment. Smith would not buy unless he obtained the title of all parties to the land. David Ely recognized the claims of the heirs, and consented to the payment. The heirs allowed David Ely to receive, for his life estate, more than he was entitled to, upon the principle of life annuities, and all that money went to pay Ely's debts.

O. Hastings, for the other defendants. I. The conveyance of the 22d of May, 1840, from the defendant David Ely to the defendant William W. Ely, was not fraudulent and void as against the creditors of the former. But if it was so, it is wholly immaterial, and can have no influence in the decision of this cause. II. The sale of the farm in question, by these defendants, to the defendant A. Smith in his lifetime, was valid, and not fraudulent and void as against the creditors of the defendant David Ely. 1. The answers are called for on oath, and they deny the fraud charged in the bill. 2. The circumstances stated in the answers of these defendants, may be considered as responsive to the call in the bill for statements of the circumstances and conversations which led to the sale, and are strongly corroborative of the denials of fraud contained in the answers. III. The deed of the 18th of August, 1819, from David Judson, deceased, is proved, by the concession of the parties, to have conveyed no title to the farm in question, to

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the defendant David Ely. IV. The deed of the 2d of October, 1823, from the deceased to Mrs. Ely, was valid; and on her death, in 1826, this inheritance in the lands in question descended to her children, subject to the life estate of the defendant, David Ely. And unless the lands were paid for with the property of David Ely, the title of the children cannot be impeached. V. The proofs show that the lands in question were paid for with the property of Mrs. Ely. The answers assert this, and are, in this respect, responsive to the bill. The deed from the deceased to Mrs. Ely admits this in express terms, and the proof introduced in opposition to it is insufficient to counterbalance the admission contained in the deed. VI. By the warranty contained in the deed from the deceased to Mrs. Ely, he was estopped in his lifetime, and his representatives are equally estopped since his death, from setting up any claim to the premises in question. VII. The circumstances of the settlement between David Judson 2d, as the agent of the deceased, and the defendant David Ely, in connection with the purchase by the original defendant Azariah Smith, and the distribution of the proceeds of the purchase, form an equitable estoppel, which in this court will be effectual to bar the plaintiff's claim, either to the lands in question, or to the proceeds thereof. VIII. The gift by David Ely of the trifling articles of personal property, mentioned in the answer, to William W. Ely, was not fraudulent; and forms no ground for relief against the latter.

GRIDLEY, J. One of the most important questions involved in this controversy, is whether the deed to Mrs. Ely, of October, 1823, was valid, and actually conveyed the farm to her; and if it did not, whether the grantor, David Judson, and the plaintiff, who represents him, are not estopped from denying that it did.

I. Did the deed executed to Mrs. Ely actually convey to her the title to the premises in question? (1.) It is said by the counsel for the plaintiff, that by the terms of the deed and the legal construction thereof, the grantor did not profess to convey any thing but his *right* and *title*; which, in fact, was no title

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whatever, inasmuch as he had already conveyed it to David Ely, by the deed executed in 1819. The deed in question, by its terms, conveyed to Mrs. Ely, her heirs and assigns, "all the two certain tracts, pieces or parcels of land lying in township number 3, in the 7th range of townships in Phelps and Gorham's purchase, and known as the town of Brighton, in the county of Monroe, and state of New-York, being lots numbers 32 and 40 of the second division, to contain, as by the original survey, 210 acres each, amounting to 420 acres, more or less; together with all and singular, the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. *And all the estate, right, title, interest, and claim and demand whatever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances.* To have and to hold the *said lots or parcels of land, to the said party of the second part, her heirs and assigns."* The grantor, then, for himself, his executors and administrators, covenants to and with the grantee, her heirs and assigns, to warrant and defend the quiet and peaceable possession of the said premises, against the grantor, his heirs, executors and assigns, *and all and every other person or persons claiming the said premises, &c. by, through or under him or them.*

To show that by the above description of the premises conveyed, the grantor merely *released*, or *quit-claimed*, such title as he *might have*, the case of *Allen v. Holton*, (20 Pick. 488,) is referred to. In that case, the grantor conveyed in the following words: "All my right, title and interest, in and unto the ferry called, &c., and the boat, &c., and all the estate, land and buildings standing thereon, as the same is now occupied and improved by me." And the court held that the deed merely purported to convey such right as the grantor had in the lands, and that the covenants were limited by the grant. And looking to the *words of the grant and descriptions alone*, it cannot be doubted that such was the intent of the parties to the deed. The intent of the grantor was to convey his right

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and title to the ferry boat, and to the land and buildings which he occupied and possessed at the time. The case, also, of *Moore v Magrath*, (*Cowper*, 9,) holds that where certain specified premises are conveyed by a grant, a sweeping clause of "all the donor's other lands in Ireland," will be rejected as not within the grant. I am also referred to 11 *Pick.* 296, 13 *Id.* 468, 7 *Id.* 169, 2 *Barn. & Adol.* 278. In my judgment, none of the cases warrant the construction sought to be given to this deed. I think it was clearly the intention of the grantor to convey the two lots described in the conveyance; and that the clause relied on by the plaintiff's counsel, was inserted, with no purpose to *limit* the grant, but for the greater caution, to embrace within it any claim and title, equitable as well as legal, which the grantor might have in the land. The *habendum* clause is equally explicit in its description of the land itself, as distinguished from the mere contingent interest which the grantor might happen to have in it. The *habendum* clause may *enlarge*, *abridge*, or *explain* the premises in a deed. (*See* 12 *Wend.* 91.) (2.) It is true, that the *legal* title was in David Ely, by virtue of the deed of 1819; and he could not be divested of it, unless Mrs. Ely was a *bona fide* purchaser without notice. The cases reported in 2 *John.* 84, 9 *Id.* 55, 4 *Wend.* 474, *Id.* 585, show that the cancellation or re-delivery of a deed, with the view of reinvesting the grantor with the title, will not have that effect. But it was competent for the grantor, by the agreement and consent of David Ely, to convey the same land to a third person, for a valuable consideration; and David Ely, consenting to, and aiding in, such new conveyance, would be estopped, in equity, from setting up his prior legal title, against the defective title of the second grantee. (*Storrs v. Bliss*, 6 *John. Ch. Rep.* 166.) Now, in this case, the fair presumption is, that it was agreed between David Ely and David Judson, that Ely would consent that the two lots in question should be deemed to be restored to Judson, and that the same should be conveyed to Mrs. Ely. The consideration or inducement to this, we do not know. It is not improbable, however, that the lands conveyed to Judson, as the condition of the conveyance

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by him to Ely, were the lands of Mrs. Ely. The consideration mentioned in the deed to David Ely, is an *exchange of lands*, and that stated in the deed to Mrs. Ely, is described as "an exchange of lands lying in Huron county, Ohio, being part of the patrimonial estate of the said Priscilla, and one hundred dollars." The consent of David Ely to this conveyance to his wife, and his active agency in effecting it, appear from the fact that the deed is in his hand-writing. And it is quite probable that the deed of 1819, would have been re-delivered or destroyed, had it not embraced, also, other lands than the lots 34 and 40. I perceive no reason why David Ely should be allowed to invalidate a deed made to his wife, when he would be precluded from doing it as against strangers. It is a well established principle, that a married woman is regarded as a feme sole when her separate property is concerned; and she may go into the court of chancery for the protection of her rights, in relation to her separate estate, against her husband, as well as against a stranger. (17 *John*. 548.) And I have already said that equity would interfere to prevent David Ely from asserting his own legal title, against a third person who had been induced by him to part with his money, for the estate of which he was seeking to deprive him. (*Storrs v. Barker*, 6 *John. Ch. Rep.* 166, and cases there cited.)

I see no reason, therefore, why a court of equity should not protect the title of Mrs. Ely, in her heirs, against her husband and those claiming under him, if, in truth, her property formed the consideration of the conveyance to her; even if she had notice of her husband's prior deed. But (3.) I am inclined to regard Mrs. Ely as a *bona fide* purchaser, without notice.

First. There is no proof of notice to her. (1.) There is not the slightest evidence of *actual notice* to her, of the prior deed to David Ely. (2.) The plaintiff's counsel claims to have shown David Ely to have been in the *possession and occupation* of these premises, at the date of the deed to Mrs. Ely; thus charging her with constructive notice of whatever title he possessed. The witnesses relied on as proving this fact, are Lewis Frick and Culver. I have critically examined the testi-

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mony of these witnesses, and it falls short of establishing the fact that David Ely lived upon or occupied the land in question. In fact, the deed to Mrs. Ely describes both grantor and grantee as residents of Fairfield in Connecticut, at the time.

Secondly. As to the consideration being the patrimonial lands of Mrs. Ely. (1.) It has been solemnly recited by the grantor in the deed; and it is said in *Cowen & Hill's Notes to Phil Ev.* 1237, that the *general rule* is "that a recital in a deed estops the party executing it and those claiming under him, by title subsequent." But this relates to the statement of the receipt of a consideration; and it is not to be denied that in an ordinary case of a statement in a deed, of the receipt of a pecuniary consideration, parol evidence may be received to contradict the statement in the deed. This may be done in a suit for the purchase money, (*Cowen & Hill's Notes*, 217, 1441;) and also on a question of damages upon a covenant in the deed; and on a question as to who received the money; and perhaps, in some other cases. (*Cowen & Hill's Notes*, 216, 218, 217, 1441, 1442.) But, as between parties and privies, (there being no fraud charged,) "it is not allowable to inquire into the consideration, for the purpose of showing an interest different from, or additional to, the interest expressed in the operative words of the conveyance, or to *defeat the deed*, or to change its legal effect, in the creation or modification of the estate." (*See 2 Cowen & Hill's Notes*, 1444, and cases there cited.) (a) It is said, also, that when a note expresses a *specific consideration*, it is not competent to prove one inconsistent with the one expressed. (*See Idem*, 1460, and cases there cited.) So, it has been held that a party is estopped, by the recital of a fact, which must have been within his own knowledge. (*See cases cited in Cowen & Hill's Notes*, 1237.) In this case the recital is of a specific consideration moving from a particular person; and it is stated to be of such a nature and description that if it be

(a) As between the parties to a conveyance, where a mere nominal consideration is expressed in such conveyance for the purpose of supporting it, a court ought not to allow proof to be given of the non-payment of any consideration, in order to destroy the deed. (*Meriam v. Harsen*, 2 Barb. Ch. Rep. 232.)

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true, certain important rights would be created in favor of the grantee, which the deed would not otherwise secure to her, in the event that the title under the deed should be drawn in question by a creditor of David Ely. I am, therefore, strongly inclined to think that the grantor should not be allowed to contradict this fact thus deliberately admitted, and obviously with the view of conveying to the grantee all the advantages arising to her from the fact of the consideration moving directly from her. But, whether the recital in question be held to estop the grantor, as to the fact recited, or not, it is quite certain that the evidence to controvert it, should be of such a character as clearly to disprove it. Now, I do not propose to go into an analysis of the testimony produced, as to the amount and disposition of the lands of Mrs. Ely in Ohio. If she and her husband had conveyed these lands under an agreement that the proceeds should be thereafter applied for his benefit, then, though the lands which were received by David Judson in exchange, were conveyed by David Ely, the fact recited might, nevertheless, be substantially true. This hypothesis is corroborated by proof of a portion of the lands being conveyed to the husband. It will be remembered that the deed to David Ely expresses the consideration to be an exchange of lands. It is, therefore, not improbable that the lands conveyed by David Ely were the very lands which were derived from the patrimonial estate of his wife, or, that such lands were purchased with the proceeds of such estate. There can be no other reasonable explanation given of the conveyance to Mrs. Ely, of the lands in question. The case might be open to the suspicion that the conveyance was made to defraud creditors; but no such ground is assumed in the bill, nor is there any evidence to show that David Ely was, at the time, embarrassed, or that he owed a dollar to any person, except to the grantor; who would not be likely to be a party to a conspiracy to defraud himself. On the contrary, it is inferrible, from the evidence, that David Ely was, at the time, a man of very considerable property. I am, therefore, of the opinion, that the complainant has not disproved the admission in the deed that the actual advance of the patrimonial

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estate of Mrs. Ely furnished, directly or indirectly, the consideration for the conveyance. (4.) But Smith purchased the premises and agreed to pay for them, on the assumption that the deed of 1823 conveyed a good title to Mrs. Ely. It is, therefore, proper to inquire what notice he had, that such was the legal effect of that deed. He found a prior deed, it is true, but he found the latter one on record and the other not; nor had he any evidence that Mrs. Ely had notice of the prior deed, when she took the conveyance in question; much less any such notice as is required to break in upon the registry acts. He, moreover, had the assurance of the grantor David Judson, under his hand and seal, that Mrs. Ely advanced the consideration out of her own property, and that David Ely was consenting to the sale to his wife, by the fact that the deed was in his own hand-writing. If, then, Smith purchased, relying on the truth of this recital, as to the consideration, the grantor would be estopped from denying it, upon the well settled principle relating to an estoppel *in pais*. (*Cowen & Hill's Notes*, 200 *et seq. Idem*, 1237.)

II. I come now to the other branch of the question proposed to be considered; which is, whether the plaintiff is not estopped from alleging that the deed to Mrs. Ely conveyed no title.

(1.) In my judgment the *grantor is estopped*. He conveyed, as I have already said, the *premises* in question, to her, and not merely his *right* and *title* to them. By this, I mean, that he *professed to convey* the premises, and that the deed described the premises, with apt words to pass the title in them to the grantee, and he acknowledged a consideration moving from *her*. In addition to this, he covenanted to *warrant the premises against all persons* claiming under, by, or through himself, and against his own acts. Now, can he set up a title as *against her*, derived under the prior deed to David Ely? Could he have purchased the premises and taken a deed from David Ely and then brought ejectment against Mrs. Ely, or against her heirs, after her death? He, doubtless, might purchase the life estate of David Ely, but could he purchase the *estate of inheritance* and enforce it against her children or their grantees?

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Can he do this in the face of his warranty against this very deed under which the claim is made? If he can, then I have misunderstood the doctrine of estoppel. It is said that this warranty against his own acts and the acts of those claiming under him, would not prevent him from acquiring an independent title, subsequently, and enforcing the same against his grantee, (13 *Pick.* 116;) and that such newly-acquired title would enure to David Ely, by virtue of another well settled rule. (14 *John.* 194.) To this there are two answers. 1. It does not appear that any such newly-acquired title was the true one; and 2. The estoppel is against the right of setting up the *prior deed* in hostility to Mrs. Ely's, when that prior deed is all the evidence produced of a superior antagonist title to hers. Much refined and ingenious reasoning has been employed to resist the application of the principle of estoppel to this case; but, it seems to me, that the doctrine is directly applicable to it; and that it would be in violation of the plainest principles of the theory of estoppel, to allow the grantor to defeat the title he professed to convey to Mrs. Ely, by and under the paramount title of David Ely, created by his own prior deed, against which he executed to her, her heirs and assigns, a covenant of warranty.

(2.) I am also of the opinion that if the *grantor* is estopped, the plaintiff, his administrator with the will annexed, is also estopped. Indeed, the case of *Osborne v. Moss*, (7 *John.* 161,) is an express authority for this position. It is supposed, however, by the plaintiff's counsel, that the case of *Babcock v. Booth*, (2 *Hill*, 181,) has established a different rule. In that case, the administrator was permitted to recover against a fraudulent purchaser, for the conversion of a yoke of oxen, of which the intestate died possessed, in a case where *the whole assets of the intestate, including the oxen, were insufficient to pay his debts.* This decision was placed upon the ground that the sale was void as to creditors, and that formerly a creditor had a remedy against a purchaser taking the property of the deceased, under such circumstances, by charging him as executor *de son tort*; and that the revised statutes have abolished this remedy, and

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given, instead thereof, the proper action to the executor or administrator of the deceased. It will be seen, therefore, that the case at bar differs, in many essential particulars, from the case of *Babcock v. Booth*. There is wanting, here, the indispensable requisite of proof that there is a deficiency of assets to pay creditors. There is no evidence that David Judson left any creditors, and there is evidence that shortly before his death he received several thousand dollars from David Ely. Again; the subject matter of the alleged fraudulent sale, is *real estate*, to which the doctrine of the revised statutes (2 R. S. 449, § 17,) has no application. The creditors of David Judson deceased, if there be any, are left to take such remedies, to avoid the sale in question, as the law has provided for them. The plaintiff not falling within the exception, is subject to the general rule; which this same case of *Babcock v. Booth*, (2 *Hill*, 183,) declares to be, "that an executor or administrator can only maintain such claim as the testator or intestate might have successfully adopted while living." Indeed, so strenuously do the courts adhere to this rule, that an assignee for the very purpose of paying creditors, and who, therefore, represents the creditors more perfectly than any administrator can do, can assert no right to property conveyed by the assignor in fraud of creditors, which the assignor himself would be estopped from asserting. This point is expressly decided in *Brownell v. Curtis*, (10 *Paige*, 218.)

For these reasons, it must be assumed, as between the parties to this suit, that when Smith purchased the farm in question it was owned by the children and heirs of Mrs. Ely, subject to the life estate of David Ely, as tenant by the curtesy. It matters not to the plaintiff, that these heirs consented that the creditors of David Ely should receive a larger portion of the purchase price, than his right, as tenant by the curtesy, would entitle him to receive. Nor can he complain that David Ely's portion of the purchase money was paid to other creditors than himself; for the election to prefer one creditor to another, is the *right* of the debtor. It is argued, however, that the farm was purchased for a sum far below its value, and that the purchase

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was, for that reason, fraudulent; and that at all events, Smith should account for the excess. If I am right in the conclusion to which I have arrived, as to the interest of the heirs of Mrs. Ely in the farm, it will follow that this remark can apply only to the interest of David Ely in the premises. And I think that it will not be denied that the creditors of David Ely have received more than his life estate was worth, even if the land were appraised at \$50 per acre. But, upon an examination of the conflicting testimony on the question of value, I cannot say that the farm was sold too low. It would be manifestly wrong to estimate the whole farm of 420 acres, at the price per acre, that would be paid for a comparatively small and more valuable part. I dismiss this part of the case, by a reference to the views of the chancellor, expressed upon a case somewhat similar, in *Grant v. Holmes*, (8 Paige, 259.)

The only remaining question respects the right of the plaintiff to reach, by this bill, the unpaid part of the note held by the deceased daughter of Mr. Ely, at the time of her death. If there had been no provision in the contract, respecting this fund, and she had, herself, made no disposition of it, it would have gone to her administrator, to be applied, first, to pay any debt she might have owed at her decease, and the residue would have been paid to her father, under the statute of distributions. But the agreement for the sale of the farm, controlled the disposition of this fund. When she sold her interest in the land in question, to the defendant Smith, she had a right to provide that the whole consideration, or any part of it, should be paid to her brothers and sisters, or that it might be so paid, on the happening of any contingency, as, of her marriage, or death. She had a perfect right, also, to dispose of this fund, by will, to her sisters; and it would not be a case where fraud against the creditors of David Ely could be predicated of the transaction, even if it were conceded that the object was to place it where his creditors could not reach it. It is every day's practice for a father so to dispose of his property by will, that the creditors of an insolvent or profligate child cannot reach it. So, in this case, Miss Ely could have disposed of this fund by

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will, (had there been no previous disposition of it,) and I think that she might agree that any part of the fund, not paid at her death, should be paid to her sisters. The fund never passed to her father, and therefore, his creditor has no more right to it than if the deceased owner of the note, had, on her death-bed, delivered the note in question, as a gift, to the persons who will now enjoy it, under the original agreement of the parties.

No claim was made, on the argument, nor can there be successfully, to reach the small amount of property given, years ago, by David Ely to one of his sons; and the plaintiff not having discovered any property or equitable rights of the judgment debtor, which can be reached by this bill, it must be dismissed; but as the plaintiff is an administrator, and had some probable ground to file the bill, so far as respects the proceeds of the farm, it is dismissed without costs. (1 *Paige*, 472.)

SAME TERM. *Before the same Justice.*

TOWNSEND and others vs. CORNING.

It is not usurious for a vendor to require the assignee of a contract for the purchase of land, to pay the costs of a suit instituted by the vendor against the assignor upon a note given for back interest, as a condition of discontinuing an ejectment suit, brought against the assignee, for the recovery of the land, and of giving time for the payment of the principal sum due.

The assignee of a contract for the purchase of land, takes the land subject to all the equities and liabilities resting upon the assignor at the time of the assignment. He is therefore equitably bound to pay the costs of a suit brought by the vendor against the assignor, upon a note given for the back interest due on the contract at the time of the assignment.

Interest upon interest cannot be collected by law, except upon an agreement to pay it, made after the day of payment has passed. But if it be paid voluntarily it is not usury. And it may be lawfully included in a note, by the agreement of the parties; without rendering such note usurious.

But a reservation, in a new security, of compound interest which had accrued upon a sum previously due, made against the will of the debtor, and as a condition of forbearance upon the new security, affects the new security with usury, and renders it void.

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IN EQUITY. This case came before the court upon an appeal, by the defendant, from a decree of the late vice chancellor of the seventh circuit. The bill was filed by Townsend and others, to foreclose a mortgage executed by the defendant Corning, bearing date on the 21st of September, 1840, and conditioned to pay the plaintiffs, (as per bond collateral thereto,) \$2500, the one half in one year and the remaining half in two years from date, with annual interest on all sums unpaid. The defendant put in an answer to the bill, setting up as a defence, that the mortgage was usurious and void. The answer stated that John Townsend and others, (constituting an association, known as the Syracuse Company,) had, at different times, theretofore, executed several contracts for the sale of certain village lots in Syracuse, to several persons named in the answer, which contracts had been assigned to one Wood, who had erected a valuable house on one of the lots; and that afterwards and on the 25th of December, 1837, Wood, for a valuable consideration, assigned the said contracts to the defendant, and agreed with the defendant to pay up the interest on the same, to the said 25th day of December; and that he, accordingly, did execute and deliver to the plaintiffs' agent, a note, with Lawrence and Baker as his sureties, for \$229.87, the amount of said interest. That in the spring of the year 1840, the plaintiffs commenced an action of ejectment against the defendant, for the recovery of the premises embraced in the said contracts, and that the same was noticed for trial and was on the circuit calendar in Onondaga county, to be tried, on the 21st of September of that year. That the defendant, thereupon, offered certain terms set forth in his answer, to procure a discontinuance of the suit, and for a general arrangement of the controversy between the parties; which terms were rejected by the plaintiffs. The answer then proceeded to state, that the plaintiffs, thereupon, by their authorized agent, submitted to the defendant a statement in writing, containing the only terms upon which they would consent to discontinue the said suit and give farther time of payment. These terms were the *payment, in cash*, of all the arrears of interest upon the several

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contracts, up to the said 21st of September, 1840, including the interest embraced in the note of \$229,87, and interest upon the interest, after the same became due, together with the costs of the ejectment suit, and also the costs in a suit prosecuted to judgment, upon the note in question, with interest on this latter sum ; the conveyance of the premises, by deed, to Corning, and the execution, by him, of a bond and mortgage to secure the payment of the balance, \$2500, to the said company, in one and two years. It was then alleged in the answer, that the defendant being forced and compelled by his circumstances, did submit and agree to those terms thus proposed, and that in compliance with the requirements aforesaid, he paid the sum down which was thus exacted of him, amounting to \$911,07, and executed the bond and mortgage as aforesaid. The above, therefore, is the corrupt agreement upon which the defendant relied, viz. the written propositions, and the agreement of the defendant accepting of the terms therein proposed.

On the 12th of March, 1844, the vice chancellor made a decree declaring the bond and mortgage valid securities, and directing a reference to a master to compute the amount due thereon. From which decree the defendant appealed.

B. Davis Noxon, & R. S. Corning, for the appellant.

J. R. Lawrence, for the plaintiffs.

GRIDLEY, J. Upon the statement of the facts respecting the alleged usurious agreement, and upon the proofs in the cause, the question arises whether there was any usury in the transaction proved.

If the bond and mortgage were usurious, it was not for any usurious interest *included* in those securities ; for they were executed for the exact amount of the principal moneys due. It must, therefore, have been on account of the *exaction of the payment of the interest upon interest, and the costs of the suit* upon the note given by Wood, Baker and Lawrence, as a

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condition of the discontinuance of the ejectment suit, and of giving time for the payment of the principal sum due.

(1.) As to the costs of the suit prosecuted against the maker of the note in question. It will be remembered that no interest had been paid on these contracts, for about the period of three years; and the note given to secure the interest that had fallen due before the assignment by Wood to Corning had been prosecuted to judgment and execution without collecting the money, though some of the witnesses were of the opinion that, by extraordinary diligence, the money might have been collected. Under these circumstances the plaintiffs commenced an action of ejectment to recover the land; and it was to settle this suit that the negotiation commenced, and was conducted by the parties. Now, had the defendant filed his bill to obtain relief from the legal forfeiture of his contract, would any court have granted it, without the payment of these costs, as well as the full amount due upon the contracts? The defendant was the assignee of Wood, and subject to all the equities that existed against him. Wood had given his own note with two sureties, to secure the interest up to a given day. The plaintiffs made a fruitless attempt to collect this note, and failing in that attempt, they resorted to the land. Would it have lain in Wood's mouth to allege that he had given them a security against himself and others, upon which a bill of costs had been incurred, by reason of *his own default* in paying it; and that it was inequitable in the plaintiffs to exact such costs as a condition of relief from the forfeiture? Might not the plaintiffs say to him, "We consented to receive your note, not in absolute payment of the interest due upon your contract, but as collateral security merely. We received it, under the obligation, if paid or collected, to apply it on the contract as payment; but if *not paid*, and by reason of such non-payment, a suit should become necessary, then, that such suit should be prosecuted at *your risk and costs*? You cannot complain of being subjected to any costs that were incurred and made necessary by your own neglect, and the violation of your own obligation. Nor does it lie in your mouth to say that a greater than the

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ordinary measure of diligence *might* have enforced a collection from your sureties." I confess I do not perceive any answer to this argument. The note was neither an extinguishment nor a payment of the interest; and the costs incurred in the suit on the note, Wood was both legally and equitably bound to pay. It was equitable and right that he should do so. And had he come into a court of chancery, asking its equitable interference, to relieve him from the consequences of his own laches, and the legal forfeiture of his contract, that court would have said to him, that when he asked for equity he must do equity, and it would grant him no relief, except upon the condition of paying the costs in question. It is, however, argued that the defendant stands in a more favorable condition, in this respect, than Wood would have done. I am of the opinion that he does not. When this note was delivered and received by the plaintiffs, it was received under the implied condition that, upon a failure to collect the note, all the consequences of a legal forfeiture should attach to the lands, and the contract being forfeited, whoever seeks relief against the forfeiture stands, in this respect, in the place of Wood. The defendant took the land subject to all the equities and liabilities Wood was under in regard to it. Before any notice of the assignment, and of the conditions of the assignment of the several contracts by Wood to the defendant, the plaintiffs had a right to regard the defendant as standing in the shoes of Wood. I would also remark, here, that much as the conduct of the agent of the plaintiffs has been censured, for not assigning the judgment against Baker and Lawrence to the defendant, I can see nothing in his conduct worthy of blame. He knew nothing of the conditions of the agreement between Wood and Corning, nor which of them was to pay the interest that was represented by the note. The defendant is doubtless entitled to an assignment of the judgment; and had he showed to the agent the agreement of Wood, to pay this interest, then I doubt not the judgment would have been cheerfully assigned. Indeed, this is the very reason given by the agent in his testimony, for refusing to assign the judgment. It was, therefore,

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neither oppressive nor usurious to exact the payment of these costs, as one of the conditions of discontinuing the suit in ejectment.

(2.) As to the exaction of the interest due upon the contracts, including the interest that had accrued upon the first amount of interest which had fallen due. It is, doubtless, settled in England and in this state, that this excess of interest cannot be collected by law, unless upon an agreement to pay it, made after the day of payment has passed. But it is equally clear that if it be paid *voluntarily*, it is *not usury*. It is paying no more than what is just and reasonable. A man agrees to pay \$1000 at the expiration of five years from the date of his bond, with the interest at the rate of seven per cent *annually*: in other words, he agrees to pay \$70 at the expiration of a year. Why should not that \$70 draw interest from the time it falls due; in analogy to the legal obligation arising upon any other contract for the payment of money by a given day? If the same man had given his note or agreement to pay \$70 at the end of a year, that instrument would carry interest upon the amount, from the day of payment. In relation to interest, upon interest however, I repeat, the law is otherwise. But though not collectable, except by a subsequent agreement, this interest may lawfully be included in a note, by the agreement of the parties; and such note is *not usurious*. The case of *Kellogg v. Hickok*, (1 Wend. 521,) is a direct adjudication of this principle. The question, however, that is presented by the pleadings and proofs in this cause, is a different one. And, though it is possible that a distinction might be taken between this case and those reported in 7 Paige, 581, and 9 Id. 211, and in several other cases, yet I will assume, as the law of this case, that a reservation in a *new security* of compound interest that had accrued upon a sum previously due, *against the will of the debtor*, and *as a condition of a forbearance upon the new security*, affects the new security with usury, and makes it void. The question, thus, becomes one of *fact*, whether this excess of interest was exacted *against the will of the debtor*, and as a *condition of forbearance*. It will be borne in mind

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that by the decision, in the case of *Kellogg v. Hickok*, (1 *Wend.* 521,) before cited, if these parties had accounted together concerning the amount due, and *by the consent of the debtor*, had included the compound interest in the bond and mortgage, these securities would not have been usurious. If, therefore, they are now to be held usurious, it must be upon the ground that the payment of the interest upon interest was exacted against the will of the defendant, and imposed upon him, as a condition of giving time upon the principal sum. Now, in point of fact, it no where appears in the proofs, that this excess of interest was ever objected to by the defendant, or by any one acting in his behalf; but on the contrary, it appears, (so far as there is any evidence upon the subject,) that the controversy was concerning the *judgment* against Baker and Lawrence, survivors of Wood, which the defendant claimed to have assigned to him, but which was declined by the plaintiffs' agent. James G. Tracy, the agent of the company, a witness of the defendant, testified that he made out a statement of what was due for interest, upon the several contracts, and for the costs in the suit upon the note for \$229,89, with interest upon these costs, and the costs in the ejectment suit, and delivered it to some one who applied to him to make it: that the amount of interest and costs was \$911,07, which was required to be paid down. This statement was produced and made exhibit No. 3, and is a statement of the amount due on each block or lot, both for principal and interest, with interest computed upon the first instalments of the annual interest respectively, with the costs, amounting to \$911,07. This statement contained an entry opposite to this sum, in the following words. "To be paid in cash. Time to be extended on bond and mortgage two years and ejectment suit settled. Corning must secure and pay as above." The witness further testified that he made up the statement, (*as to interest*) *as it appeared on the exhibit, and for what "he considered due justly to the company and for what they had a legal right to ask."* This last part of the testimony was taken under objection, and if the reservation of the compound interest were an act of usury, *per se*, then the objection would

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not be well founded ; but for the purpose of showing the intent of the parties, upon a question whether the including of this excess of interest was voluntarily agreed to, and not imposed as a compulsory condition of giving time on the principal sum, I think it was admissible. Here, then, was a proposition made in writing, of the amount claimed to be due, and the payment of which was required as a condition of settling the ejectment suit, embracing a statement of the interest account, which was believed to be correct by the agent who made it. Now was this *voluntarily agreed to* ? I repeat, there was no attempt to show that any objection was made to this mode of computing the interest, or any question raised concerning it. The only question put to the witness, as to what occurred, during the negotiation, was as to his refusal to assign the judgment, which he declined doing, upon the ground I have already stated. The only other witness who gives any evidence concerning this part of the case, is Henry Davis, who testifies that at the request of the defendant, he went to the agent of the Syracuse Company ; that exhibit No. 3, is a statement which the agent gave him, at the time, and that he (the agent) proposed to receive the \$911,07 in cash, and to give some time for the payment of the balance, on its being secured by bond and mortgage. The witness then proceeds as follows. "I told him there was a judgment against Baker and Lawrence, which I thought Corning entitled to have an assignment of. He declined giving an assignment, and said he would not vary from the terms of this statement. I paid him \$911,07." Now, to what did the agent refer, when he declined to vary from the statement ? Clearly to the assignment of this judgment, which would materially vary the proposition for a settlement ; and I doubt not that Mr. Townsend had reference to the same inadmissible condition, when he gave his instructions to the agent, as is mentioned in the cross-examination of this witness. I am strengthened in this opinion by a statement in the answer, at the 42d folio, where it appears that the defendant made a proposition to adjust the existing controversy, on having this judgment assigned to him, which Mr. Townsend declined to do. There is, there-

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fore, no evidence to warrant the conclusion that the excess of interest was ever objected to, or drawn in question at all. Nor does it appear that the question of an extension of *time* was ever agitated by the parties. It is true, that it was entered in the statement of the agent; but that it was ever asked for, or negotiated about, the case is barren of proof. Nor is there the least ground to believe that the terms of settlement would have been at all different if the whole sum, including the principal, had been paid down. The cross-examination of Davis, especially the closing part of it, shows that what was desired on the part of the defendant was to settle the ejectment suit, upon the condition of getting an assignment of the judgment; and that neither the question of *interest* nor of *time* was at all alluded to.

For these reasons, the decree of the vice chancellor must be affirmed, with costs.

Montague Sp. T. Ridley J.

SAME TERM. *Before the same Justice.*

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In the interpretation of a contract, and for the purpose of ascertaining the intentions of the parties, it is allowable for the court to resort to the extrinsic circumstances which surround the transaction, and thus to place itself in the situation of the contracting parties, whose language it is called upon to construe.

The diversion or use of a *part* of a lot leased by the superintendent of the Onondaga salt springs for the manufacture of salt, for other purposes,—e. g. the erection of dwelling houses, barns, &c.—will not work a forfeiture of the premises to the people of this state.

The statute declaring that the diversion or use of salt-lots, for other purposes than the manufacture of salt, shall work a forfeiture of the estate of the lessee, and divest him of his interest therein, does not apply to the diversion of a *part* of a lot. It only prohibits the diversion and use of an *entire* lot, for purposes foreign to the object of the lease.

A party to an agreement for the exchange of lands, for leasehold premises, will not be permitted to repudiate the contract, after having enjoyed the leasehold premises

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assigned to him, for years, without disturbance, and after the other party has expended large sums in improvements upon the land received in exchange by him; on the ground that a legal forfeiture had been incurred by such other party, previous to the exchange, which has given to the lessors a right to re-enter into the leasehold premises; especially in a case where such forfeiture, if any, had occurred by means of the use of the land for a purpose, and in a manner, known to the objecting party, and by virtue of a public law of which he was bound to take notice.

Although a legal forfeiture has been incurred by the lessee of land belonging to the state, which gives to the people the right to re-enter, yet the lessee has an interest in the lease until the forfeiture is enforced, and a contingent right to a new lease, in case the people think it proper to waive the forfeiture and to grant a renewal. Such an interest in land will be protected by a court of equity; and a specific performance will be enforced in relation to it.

It is a maxim of equity, that what has been agreed to be done, and what ought to be done, shall, for the advancement of justice, be regarded as done.

Neither the making of a contract for the exchange of parts of lots held under a lease from the superintendent of the Onondaga salt springs, nor the execution of a conveyance of such parts, by the lessee, will work a forfeiture of the premises, to the people; although such contract and conveyance are in general terms, and contain no restriction upon the grantee, as to the manner in which the premises are to be occupied and used.

Statutes creating penalties or forfeitures are to receive a strict construction. And it is no part of the duty of courts to extend the meaning of the words and phrases employed by the legislature.

IN EQUITY. This was an appeal by the defendant from a decree of the late vice chancellor of the seventh circuit. The bill was filed in the court of chancery, to compel the specific performance of a contract for the exchange of lands situated in the village of Liverpool, in the county of Onondaga. The agreement was made about the first of May, 1836, and provided for the conveyance by the plaintiff Hasbrook, to the defendant H. Paddock, of certain parts of two salt lots, in exchange for a village lot, and such a sum as should be determined to be the fair difference in value, by appraisers agreed upon by the parties. The parties to the contract soon afterwards exchanged possession of the premises, in pursuance of the stipulations contained in it, and the plaintiff has, from time to time, made valuable and permanent improvements upon the premises thus contracted to be conveyed to him. The defendant stated, in his answer, that the parts of lots agreed to be exchanged with

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him, by the plaintiff, were, at the time of making such agreement, and had before then been diverted and used for other purposes than making salt; which they insisted was a violation of the statutes of this state, passed in relation to the Onondaga salt reservation, and a breach of the lease under which the lots were held. And they averred that the plaintiff had built, or was interested in building, a house and barn, and other erections, on the lots, for other uses than the making of salt. And they insisted that by reason of such diversion, the interest of the plaintiff became forfeited, and was revested in the people of the state. The cause was heard before the vice chancellor upon pleadings and proofs, and he made a decree directing a specific performance of the contract by the defendant.

Several grounds of defence were relied upon before the vice chancellor, which were abandoned upon the appeal. On the argument in this court, the defendant's counsel objected to the performance of the contract, upon the following grounds: That the plaintiff had no title to, or interest in, the premises which he contracted to convey; that the contract was illegal and void; and that if it was not, its performance would now be contrary to the existing law, and would itself work a forfeiture of the premises, to the people of the state.

G. F. Comstock, for the appellant.

J. R. Lawrence, for the respondent.

GRIDLEY, J. If the contract is to be understood as calling for any thing more than a *leasehold interest* of the premises agreed to be conveyed by the plaintiff, then it is quite clear that he did not possess such a title or interest as he agreed to convey; for, the *title* to these lands is *inalienable* in the people, by the fundamental law of the state. (*Const. art. 7, § 10.*) (a) But such is not the fair construction of the agreement. In the interpretation of a contract, and for the purpose of ascertaining

(a) See also 1 R. S. 252, § 1, (3d ed. p. 264.)

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the intention of the parties to it, it is allowable to resort to the *extrinsic circumstances* which surround the transaction, and thus to place ourselves in the situation of the contracting parties whose language we are called upon to construe. (2 *Cowen & Hill's Notes to Phil. Ev.* p. 1399, note 957. See also *Greenl. Ev.* p. 327.) Now, it was perfectly understood by the defendant in this cause, that the plaintiff neither had, nor professed to have, any thing more than the statutory leasehold interest in these salt lots, with such right of renewal as that interest would confer. The estate which the lessee possessed in lots of this description, was notorious to both parties; and they must be regarded as contracting with reference to that interest, and nothing beyond it. It also appears that when the deed prepared by the plaintiff under the contract, purporting to convey only a leasehold interest, was shown to the defendant, he made no objection to it on that account; thus affirming the construction which the plaintiff had given it. The defendant also insists, that when the contract was made, the former lease had expired, that the plaintiff had no absolute right to a new lease, and that it does not *now* appear that he was entitled to a renewal under the act. (1 *R. S.* 346, 2d ed.) The answer to this suggestion is, that the officer, whose duty it was to determine that question between the plaintiff and the state, has decided it in *his* favor, and has actually granted a new lease for a term extending to 1859.

II. It is further argued, that by virtue of the provisions of the act of 1829, (1 *R. S.* 346,) by the diversion of a part of the lots in question to the uses of a dwelling house, barn, shed, &c., and *from* the business of the manufacture of salt, *the same had become forfeited to the people*, and therefore the plaintiff had no interest in the premises, capable of being conveyed.

To this, I would answer, (1.) That this very question was submitted to Chief Justice Beardsley, in 1838, then being attorney general of the state. And his opinion is expressed in a communication made to the senate, (*Senate Doc. vol 2, No. 60*,) that *such diversion and use of a part of a salt lot did not work a forfeiture of the lease*. I perceive no reason to question the

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soundness of this opinion. (2.) If, however, this was a mistaken opinion, and a diversion of the premises in question from the business of manufacturing salt, *did* work a legal forfeiture of the lease, still this consequence was produced by means of a use of the lot, which was well known to the defendant, and by virtue of a public law, of which he was bound to take notice. It would therefore be inequitable to permit the defendant to repudiate the contract, after having enjoyed the premises assigned to him by the agreement, without disturbance, for years, and after the plaintiff had expended large sums in permanent improvements upon the lot contracted to him, and which the defendant is now seeking to reclaim. Although a legal forfeiture had been incurred, which gave the people a right to re-enter, yet the plaintiff still had an interest in the lease until the forfeiture should be enforced, and a contingent right to a new lease, which the people *might* grant, electing to waive the forfeiture. This turned out to be a *valuable interest*; for the lease was in fact renewed, the act, subjecting the lot to a forfeiture, (if any such act had been committed,) having been *waived and forgiven*. That *such interest in lands* will be protected by the court of chancery, and that a specific performance will be enforced in relation to them, see *Armour v. Alexander*, (10 *Paige*, 573,) and *Phyfe v. Wardell*, (5 *Id.* 279;) where the subject of these contingent interests in lands, and such as depend merely on the good will of those who hold the paramount title, is fully discussed.

III. A more plausible objection to the relief sought by the bill in this cause, arises under the provisions of the act of 1838. (*Laws of 1838*, p. 289.) By the third section of that act it is enacted, that "*Hereafter, any underletting, diversion or use, for any other purpose than the manufacture of salt, of any of the lots that have been or may be leased by the superintendent of the Onondaga salt springs, to any person or corporation, for said manufacture, shall work a forfeiture of the leasehold estate, and absolutely divest the lessee, or tenant, of all his interest therein.*" Now the argument arising under this provision, against the claim of the plaintiff to have this agreement performed, is this;

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that the use of the premises in question for purposes other than the manufacture of salt, since the passage of the act of 1838, has worked a forfeiture of the leasehold estate, so that the plaintiff cannot convey any interest in the premises to the defendant; and that the execution of the conveyance will itself be a direct violation of the act. It is my opinion that this argument furnishes no answer to the plaintiff's claim to relief; because (1.) The contract was made, possession taken under it, by the respective parties, and large outlays were made by the plaintiff upon the lot of which he now asks a conveyance, nearly two years before the passage of the act in question. The rights of the parties, therefore, should be deemed fixed, and should be now adjudged, as they existed before the enactment of the law under which the forfeiture is alleged to have been incurred. If the forfeiture has been incurred since 1838, it has been incurred by *the act of the defendant himself*. The plaintiff is no more responsible for the forfeiture under *that act*, than if he had been an utter stranger to the whole transaction. Nor would the rights of the parties be at all affected, if it were conceded that the conveying the premises to the defendant would now work the forfeiture created by the act. For he alone is chargeable with the delay in the performance of the contract which is now made an objection to its completion. In the year 1837, and long before the act of 1838 was passed, the plaintiff was ready, and demanded an execution of the conveyance, which was declined by the defendant. Now it is a maxim of equity, that what has been *agreed* to be done, and what *ought* to be done, shall, for the advancement of justice, be regarded *as done*. (1 *Story's Eq. Jur.* §§ 64, 69.) Equity will therefore consider this deed of the premises bargained by the plaintiff to the defendant, as having been made when it should have been, and would have been, had it not been for the culpable neglect of the defendant. Equity will not allow him to gain an advantage by his own inexcusable laches; but will adjudge the rights of the parties, as it would have done had the contract been fully performed and consummated a year before the act was passed. There is, therefore, not the slightest ground for visit-

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ing upon the plaintiff the consequences of any illegal use of the premises, under the act of 1838; for the plain reason that the defendant himself has incurred the forfeiture, and must alone endure its burden. (2.) I do not think that the act of making the conveyance in pursuance of the contract, nor even the making of the contract itself, would work a forfeiture of the premises, under the most stringent construction of the statute. There is no provision in the contract or deed which requires, or contemplates, the use of the premises for any illegal purpose; and it certainly should not be presumed that the defendant intended to use them in an unlawful manner. If, however, it turns out that the purpose for which he designed to occupy them, *has become unlawful*, he will doubtless alter his purpose and put them to a lawful use. (3.) In the case of *Williams* ads. *Marks*, the supreme court has recently held that the diversion of an *entire lot*, and an appropriation of it to the purposes of keeping a tavern, worked a forfeiture of the lease, under the act of 1838. Without intending to question the authority of that decision, I am nevertheless of the opinion that the case under consideration is not one of those cases which are subjected to forfeiture by the act. I need not stop to cite authorities to show that acts creating penalties and forfeitures are to receive a *strict* construction. The statute does not, either in express terms, or by a fair implication, apply to a *part* of a salt-lot. It only speaks of the *use* and *diversion* from the business of manufacturing salt, of a *whole lot*. The facts disclosed by the evidence show very satisfactory reasons why the legislature might well prohibit a *whole* lot from being occupied for a purpose foreign to the object of the lease; and at the same time allow *parts* of lots to be used for dwelling houses, barns, &c. It appears by the proofs in the cause, that these salt lots are of considerable depth, running entirely across the street called *Salt-street*, or *Brow-street*; and that such portions of the lots as lie *below* this street are used solely for the *actual manufacture of salt*, while the parts lying above *Brow-street* and between that and *First-street*, are usually appropriated to dwellings, out-houses and gardens. In this way, the upper parts of these lots, though

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not *actually occupied as salt blocks*, are nevertheless subservient and auxiliary to the general business of the salt manufacture. Dwelling houses for the proprietors and their families, and boarding and lodging houses for the accommodation of the workmen, situated near their place of labor, are certainly convenient, if not indispensable, to a successful prosecution of the business. This consideration alone is enough to show a sufficient reason why the legislature were unwilling to require the *whole* of these lots to be *literally* occupied with salt blocks, and to visit with the penalty of forfeiture such parts of them as had been covered with houses and used in business other than the *actual* manufacture of salt. Such an enactment would have been not only inexpedient, but cruelly oppressive and unjust. And I repeat, that until the legislature has explicitly declared their intention to forfeit parts of lots, it is no part of the duty of courts, in the construction of a penal statute, to extend the meaning of words and phrases which the lawmakers have chosen to employ. I do not think it necessary to add more, except to refer to the able opinion of the vice chancellor who decided this case in the court below. He has given an accurate survey of the legislation upon the subject of the salt manufacture, and an interesting and instructive history of the operations of these laws; and of the large and important interests that have grown up under the former administration of them in the village of Liverpool, and has shown the dangerous consequences to those interests if such a construction should be given to the act of 1838, as is claimed for it by the defendant's counsel.

For these reasons the decree appealed from must be affirmed, with costs.

MONROE GENERAL TERM, December, 1847. *Maynard*,
Selden and *Welles*, Justices.

O'MALEY *vs.* REESE.

The section of the constitution which provides that on the first Monday of July, 1847, jurisdiction of all "suits and proceedings originally commenced and then pending in any court of common pleas," shall become vested in the supreme court, means all suits originally commenced in the old courts of common pleas, whether the same have proceeded to final judgment, or not; provided any further judicial action is to be had thereon. Accordingly *Held*, that a motion for a special report of a referee, to be made up and incorporated in the record, in a case thus situated, after the first Monday of July, 1847. was properly made in the supreme court.

In such a case the supreme court will not grant a mandamus, directed to the referee. The legislature did not intend, by the 55th section of the judiciary act of 1847, to give to the new county courts any judicial power in relation to a judgment in a suit originally commenced in the old court of common pleas.

THIS was a motion, by the plaintiff, for a rule requiring a special report of the referee to be made, under the direction of P. G. Buchan, the referee, of the facts proved before him, and for leave to incorporate the same in the judgment record. The same motion was made at the special term of this court held at Rochester, in September, 1847, by Justice Welles, and the case here was the same as that then presented, excepting that on this motion the affidavits were properly entitled in the cause. The same objections to the granting of the motion were now urged which were then made; except that instead of objecting that the affidavits on which the motion was founded were *not entitled*, it was now objected that they *were entitled* in the cause.

Paine & Cochrane, for the plaintiff.

Bowne & Benedict, for the defendant.

By the Court, MAYNARD, P. J. This is the same case, upon the merits, which was presented at the special term in Monroe county, in September last; with the affidavits upon which the motion is founded regularly entitled in the cause, so

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as to avoid the formal objection upon which the motion was then denied. We have had the case under consideration, and have concluded to adopt the reasoning of Justice Welles, who decided the case at the special term.

Motion granted.

The case at the special term was as follows: Motion for a rule requiring a special report of the referee to be made, under the direction of P. G. Buchan, the referee, of the facts proved before him, and for leave to incorporate the same in the judgment record; or that an alternative mandamus issue to said Buchan, requiring him to make such report. The affidavit upon which the motion was founded was not entitled in the cause. It stated that on the 9th of November, 1846, this suit was commenced in the court of common pleas of Monroe county, by filing and serving a declaration, to which the defendant pleaded the general issue; that at the December term of that court, the cause was, by consent of parties, referred to P. G. Buchan, then first judge of said court, as sole referee; and that on the 18th of January, 1847, the cause was brought to a hearing before the referee, who reported generally, in favor of the defendant, without stating any point or question that had been decided by him. It appeared that the referee was of the opinion that the facts were sufficiently proved to entitle the plaintiff to a report in his favor; although there was some conflicting evidence upon the facts; but he reported in favor of the defendant on the ground of the insufficiency of the declaration. The plaintiff's attorney made a case, setting forth all the evidence; upon which he moved at the last March term of the common pleas to set aside the report. On the argument of the motion for a new trial the testimony was not read or reviewed, but the facts were assumed to have been proved, and nothing but the question of law was argued. At the last June term, the court denied the motion to set aside the report. The plaintiff's attorney, at the same time, moved the court, on affidavit and notice, for a rule requiring the referee to make a special report of the facts proved before him, and that the defendant's attor-

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ney incorporate the same in the record, or that the plaintiff's attorney have leave to do so. The court denied the motion, on the ground that the practice requiring a special report had been abolished. The affidavit also stated that P. G. Buchan was now judge of the county courts of said county of Monroe, and that the defendant perfected and docketed judgment in the cause on the 28th of June last, and that he intended to bring a writ of error to reverse the judgment of the court of common pleas.

The defendant's counsel raised a preliminary objection to the affidavit on which the motion was founded, that it was not entitled. The court received the affidavit, subject to the objection. The counsel also objected that the cause was not in this court, and cited Art. 14, § 5 of the constitution, and § 55 of the judiciary act of 1847. He also contended that this was not a proper case for a mandamus.

WELLES, J. In order to determine the preliminary objection to the affidavit, it is necessary to decide whether the cause is pending in this court. If it is, then the affidavit is irregular, in consequence of not being entitled. (2 *Cowen's Rep.* 500; *Gra. Prac. 2d. ed.* 160, 677, 678.)

By the new constitution, art. 14, § 5, it is provided, amongst other things, that "on the first Monday of July, 1847, jurisdiction of all suits and proceedings then pending in the present supreme court and court of chancery, and all suits or proceedings originally commenced and then pending in any court of common pleas (except in the city and county of New York,) shall become vested in the supreme court hereby established. Proceedings pending in the court of common pleas, and in suits originally commenced in justices' courts, shall be transferred to the county courts provided for in this constitution, in such manner and form, and under such regulations as shall be provided for by law."

Is this a suit or proceeding originally commenced or pending in the court of common pleas on the first Monday in July, 1847, within the meaning of the above recited section of the constitu-

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tion? If it is, then by force of that section, and without the aid and notwithstanding any action of the legislature, it was, on that day, transferred into this court. It is argued that a final judgment had been entered and perfected, and that the suit was not then "*pending*," in the sense of the constitution. It is also urged that the 55th section of the judiciary act (*Laws of 1837*, p. 319,) which directs that execution may be issued out of the new county courts, to collect any judgment in the court of common pleas in the same county, is a legislative construction of the constitution in this respect, and shows that where final judgment has been perfected in the court of common pleas, the suit or judgment is transferred into the county court.

With respect to the position that it is not a suit or proceeding which was originally commenced, and on the first Monday in July 1847, *pending* in the common pleas, I think it is too rigid a construction of the constitution, and one never intended by its framers. If this case does not come within the class of cases transferred into this court, by the constitution, I think there is no court in existence having any control over it. The court of common pleas does not exist, and it is not transferred into the new county court. That part of the section of the constitution which describes the business to be transferred from the courts of common pleas into the new county courts is in these words: "Proceedings-pending in courts of common pleas, and in suits originally commenced in justices' courts." It is observable that this provision just alluded to uses the words "proceedings pending" &c, and declares that *they* shall be transferred &c. in such manner &c. and under such regulations as shall be provided by law. The section had just before absolutely transferred into this court all *suits and proceedings* originally commenced and pending in the courts of common pleas. I conclude, therefore, that the matters to be transferred into courts of common pleas in such manner as should be provided by law, were *proceedings*, such as petitions for the discharge of imprisoned debtors; applications for the relief of sureties in criminal cases; petitions for the discharge of debtors under the two-third act; and a variety of other statutory proceedings forming an important class of bu-

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business transacted in the courts of common pleas; which were never denominated suits; together with proceedings in *suits* originally commenced in justices' courts. I do not regard the criticism on the word *pending*, in the forepart of the section cited, as being just or fair, or as calculated to elucidate the meaning of the instrument. If it should prevail, a large class of important business of the courts would be left unprovided for.

If there is no further question to be determined in relation to the judgment perfected in the old court of common pleas, then it would not be necessary to transfer the case into any court. No further judicial action in such case, is to be had; and all that remains to be done is to issue execution; and the legislature has provided for that, in the 55th section of the judiciary act. That section authorizes the issuing of executions out of the county court, to collect such judgments. This, however, is a mere ministerial act. The judgment no more becomes the judgment of the new county court, than the judgment of a justice of the peace, where a transcript had been filed with the county clerk, became a judgment of the old court of common pleas.

The views above expressed render it unnecessary to consider the argument of legislative construction. That argument, I think, has been already met and answered. For, if I am not mistaken, the legislature did not intend, by the 55th section of the act, to give to the new county courts any judicial power in relation to a judgment in a suit originally commenced in the old court of common pleas.

The conclusion to which I have arrived is, that, by the terms "suits and proceedings originally commenced and then pending in any court of common pleas," in the constitution, is intended all suits originally commenced in the old courts of common pleas, whether the same have proceeded to final judgment or not; provided any further judicial action is to be had thereon; such, for instance, as a motion for a new trial upon a case, or motions to set aside a report of referees, to amend the record, to set aside the judgment for irregularity; or the kind of relief asked for on this motion.

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If I am right in this conclusion, it follows that the suit is in this court, and that the affidavit should have been entitled. And it is perfectly clear that this is not a case for a mandamus.

The motion is denied without prejudice, and without costs.

ONEIDA SPECIAL TERM, December, 1847. *Gridley*, Justice.

BURCH vs. NEWBERRY & BURCH.

On the 30th of April, 1845, upon the termination of a copartnership between W. L. N. & I. H. B., under the firm of N. & B., a new copartnership was formed between I. H. B. and T. B. the plaintiff, as their successors in business, under the name of I. H. B. & Co., to commence on the 1st of May. Previous to the time when the new partnership commenced, I. H. B. paid and took up outstanding notes of the old firm to the amount of \$10,000, and received in payment for that advance the draft of N. & B. upon J. T. S. & Co., for \$3000, and their order upon J. T. S. & Co., dated May 1, 1845, requesting them to deliver to I. H. B. & Co., or order, certain specified drafts, or their avails, to the amount of \$6228.88, which J. T. S. & Co. had previously received from N. & B., for collection; the new firm giving their note to N. & B., for \$940.93, the difference between the \$10,000 paid by them and the amount of N. & B.'s draft and order. The order was, on the day of its date, endorsed and sent by I. H. B. & Co., to J. T. S. & Co., by mail, in a letter requesting the latter to acknowledge the receipt of the drafts called for by the order, and hold them for collection on account of I. H. B. & Co., and to sell two of such drafts, and credit the proceeds. On the 9th of May the drawees of the order wrote to the drawers, merely acknowledging the receipt of such letter and order from them, and promising to refer to such order in their next letter. On the 16th of May J. T. S. & Co. failed; without having complied with the requirements of the order; and having, in fact, parted with the drafts therein mentioned, and used and converted the proceeds of the sale for the purposes of their business, generally, previous to the date of the order, by virtue of a general authority as the agents of N. & B., to sell any paper of theirs whenever their account required it. Up to the time of their failure J. T. S. & Co. maintained a good credit and paid all legal demands when presented.

On a bill filed by T. B. against I. H. B. & W. L. N., claiming that by reason of the failure of the drawees to meet the order, I. H. B. & Co., the holders, became entitled to receive from N. & B. as the drawers, in proportion to their shares and interest, the amount which they had paid for the order on J. T. S. & Co., and praying that W. L. N. might be decreed to refund and pay over to I. H. B. & Co. the moiety of such amount for which he was liable:

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Held, 1. That the transaction between I. H. B. and the old firm of N. & B. was to be regarded as an adjustment and settlement, *pro tanto*, of the copartnership business of that firm, and as a purchase by, and a transfer to, I. H. B., one of the copartners, of all the effects of the firm then remaining in the hands of J. T. S. & Co.

2. That at the time of the assignment of the drafts, or their avails, by N. & B., a fund representing such drafts was in the hands of J. T. S. & Co. subject to be transferred by any lawful contract or assignment executed by N. & B.

3. That T. B., the plaintiff, deriving his title to relief under the order of N. & B. upon J. T. S. & Co., he became jointly interested with I. H. B. in the fruits of his purchase of the partnership funds, and merely succeeded to an undivided moiety of his interest therein.

4. That the agreement was a fair one, without fraud or warranty, and was binding upon both parties; that the new firm were the absolute owners of the entire beneficial interest in the fund; and that the loss thereof, by the failure of the drawers sixteen days after the date of the order, fell upon them, and furnished no ground for relief to the plaintiff, against W. L. N.

5. That the order upon J. T. S. & Co. was not a bill of exchange, or an order drawn on a particular fund, but was an assignment of the fund to the holders, and transferred the property therein to them; especially after the presentment of the order.

6. That the conduct of J. T. S. & Co., instead of being a refusal to comply with the order, was to be regarded as an acquiescence in its directions, with a postponement of an immediate compliance therewith.

7. That J. T. S. & Co., being requested to deliver and receive the fund, themselves, for the new firm, were to be presumed to have performed that duty; inasmuch as they had the money in their possession. That upon the receipt of the order, and of the letter of I. H. B. & Co. they were thenceforward the holders of the fund as the agents of that firm; and the omission to place it formally to the credit of I. H. B. & Co., or to acknowledge the holding of it for them, was the neglect of an act to be done as the agent of that firm solely. And that by the omission of that act N. & B. ought not to be prejudiced.

8. That the payees of the order were bound to use reasonable diligence in presenting the same to the drawees, and demanding payment. That a demand of payment made by J. T. S. & Co. of themselves, was no such demand as the law contemplates when it holds the party to the use of a reasonable diligence; but that a demand should have been made by some third person authorized to receive the actual possession of the fund.

It is a general maxim of the court of chancery that equity regards whatever is ordered to be done by one having authority—as by a testator in his will—or, what ought to be done, as actually done.

IN EQUITY. In April, 1845, the plaintiff Thomas Burch and the defendant Isaac H. Burch entered into an agreement, at Little Falls, to form a copartnership for carrying on the busi-

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ness of exchange brokers at Chicago, Illinois, under the name of I. H. Burch & Co., to commence on the 1st of May thereafter. I. H. Burch was to reside at Chicago, and take charge of the business, and the plaintiff resided at Little Falls. The plaintiff and I. H. Burch provided the funds, and prepared to enter on the business. I. H. Burch and W. L. Newberry, also a resident of Chicago, had for more than a year previous to such agreement, been engaged as copartners in the business of exchange brokers at Chicago, under the name of Newberry & Burch. And by a mutual understanding, it was agreed between them that their partnership should be dissolved, and their business closed. Pursuant to this understanding, and in order to effect the dissolution, I. H. Burch received funds on the joint credit of the plaintiff and himself, and with such funds took up the notes of Newberry & Burch to the amount of \$10,000 besides some interest, then outstanding; which notes I. H. Burch took with him, on his return to Chicago; when the dissolution of the firm of Newberry & Burch was agreed to take effect on the 1st of May, 1845. On the 30th of April, 1845, Newberry & Burch made their draft on the house of John T. Smith & Co., New-York, for \$3000, payable at sight, to the order of I. H. Burch & Co., to apply on, and towards, the notes of \$10,000 of Newberry & Burch so paid and taken by I. H. Burch as above stated. To make up the balance of the \$10,000, Newberry & Burch, on the same day, made their order in writing addressed to J. T. Smith & Co., in the words and figures following:

"Chicago, April 30, 1845.

Please deliver to I. H. Burch & Co. or order described drafts, or their avails, which you have received from us for collection.

H. C. Stone on J. Nevins & Sons.	Dated June 11,	
due June 3	- - - -	\$1100
Do. same, Feb. 8, May 23	- - - -	1100
Do. " " 20, May 24	- - - -	1100
J. Corning & Co. Corning & Co.	March 11-14	928,88

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O. Lunt on Bigelow & Gibson, Boston, Nov. 26,
6 m. 29 - - - - - 1000
T. H. Gibson, New-York, Dec. 13, 6 m. June 6, 1000

\$6228,88

And oblige

NEWBERRY & BURCH."

This order was, on the same day, endorsed by I. H. Burch and sent by mail in the name of I. H. Burch & Co., to John T. Smith & Co., New-York, in a letter containing other matters, and referring to the order as follows: "Also Newberry & Burch order on you for sundry collection or its avails, amounting to \$6228,88. The two drafts on Nevins & Sons of \$1100 each, due June 3 and May 23, please sell at once and credit proceeds. Please acknowledge to us the receipt of the paper called for by the above order, specifying the items and time of maturity, and hold them for collection on our account." The drafts specified in this order were mutually charged and credited in the books of Newberry & Burch and of I. H. Burch & Co. to each other; and the difference between their amount together with the \$3000 draft, and the \$10,000 paid by I. H. Burch & Co. upon the two notes of Newberry & Burch, was made up by the note of I. H. Burch & Co. At the time the order for the drafts was given it was understood and agreed between Newberry and I. H. Burch, that Newberry & Burch should be holden liable to I. H. Burch & Co. as endorsers on all of the drafts, except those on Nevins & Sons. On the 9th of May, 1845, John T. Smith & Co. immediately after the receipt of the order of Newberry & Burch, by their letter of that date, acknowledged the receipt of the letter of I. H. Burch & Co. of May 1st, and of the enclosed draft for \$3000, stating it was placed to the credit of I. H. Burch & Co.; and in reference to the order for the several drafts, they said, "We have no time to-day to examine N. & B.'s order for the paper. Will refer to it in our next." But no other reference to those drafts, nor any acknowledgment or communication respecting them was ever made, until after the failure of John T. Smith & Co. on the 16th of May.

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John T. Smith & Co. not having complied with the requirements of the order to deliver to I. H. Burch & Co. the drafts, or the avails thereof, excepting the draft of Lunt for \$1000, and having stopped payment, the bill in this cause was filed by Thomas Burch against Newberry and I. H. Burch, claiming that by reason of the failure of the drawees to meet the said order, I. H. Burch & Co., the holders, became entitled to demand and have of and from the late firm of Newberry & Burch as the drawers, in proportion to their shares and interest, the amount paid or accounted for by them to such late firm for the order for the drafts, less the amount of the draft of Lunt, which had been handed over to the plaintiff. And the bill prayed that Newberry might be decreed to refund and pay over to the firm of I. H. Burch & Co. the moiety of such amount for which he was liable; and for general relief.

The bill stated, that at the time the order for the drafts was given, Newberry and I. H. Burch fully believed that the drafts were in the hands of J. T. Smith & Co., duly accepted and waiting maturity, and they had entire confidence and belief in the solvency and integrity of J. T. Smith & Co. The answer of Newberry denied that either he or I. H. Burch believed, at that time, that the drafts were in the hands of John T. Smith & Co., duly accepted and waiting maturity. But it stated that, on the contrary, the words "or their avails" were inserted in the order at the suggestion of I. H. Burch, expressly to meet the contingency that the drafts, or some of them, had been sold by John T. Smith & Co. And the answer denied that it was understood, or agreed, that the firm of Newberry & Burch *guarantied* the responsibility of J. T. Smith & Co., or the delivery of the drafts mentioned in the order, or their avails; although it admitted that all parties believed J. T. Smith & Co. to be solvent, and had confidence in their integrity. The bill stated that there was at all times after the transmission of the drafts specified in the order, funds and money of Newberry & Burch in the hands of J. T. Smith & Co., more than sufficient to meet all the drafts drawn by Newberry & Burch on them, without recourse to any collection paper in their hands;

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that before the time when the order was made by Newberry & Burch, J. T. Smith & Co. had in fact sold and disposed of the drafts, (excepting the draft of O. Lunt for \$1000,) and had used and converted the proceeds of such sales to the purposes of their business, without reference to the accounts of Newberry & Burch, and had in no manner given credit to N. & B. on their books for the proceeds of such sales, nor in any manner applied them for the benefit of N. & B.; and that neither at the time the order for the drafts was made, nor at any time afterwards, were the drafts, or any of them, (except the draft of Lunt,) subject to the order of N. & B., or in any manner under their control. That J. T. Smith & Co. failed, and stopped payment on the 16th of May, 1845; and that they were in fact insolvent at the time the order was given, and for several months before their public bankruptcy. That I. H. B. & Co. used all reasonable diligence in transmitting and presenting the order, &c. The defendant Newberry insisted, in his answer, that the drafts mentioned in the order, and the avails thereof, were delivered to I. H. Burch & Co. when the order was received by John T. Smith & Co.; and that from that time John T. Smith & Co. held and possessed the drafts, or their avails, as the agents of I. H. Burch & Co., and with their knowledge and consent, and pursuant to their instructions.

The cause was heard on pleadings and proofs.

A. Loomis & H. Denio, for the plaintiff.

J. A. Spencer & F. Kernan, for the defendant Newberry.

GRIDLEY, J. I am satisfied, by the evidence in this case, that the transaction of the 30th of April, 1845, should be regarded as an adjustment and settlement, *pro tanto*, of the copartnership business of the firm of Newberry & Burch. The copartnership existing between the parties expired on that day; and the transaction in question embraced a purchase by, and a transfer to, I. H. Burch, one of the copartners, of all the effects of the firm then remaining in the hands of John T. Smith &

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Co., of New-York. These assets amounted to the sum of \$10,961,48; and the firm received in satisfaction therefor, a claim against itself amounting to \$10,020,55, arising out of the payment by Burch of two \$5000 notes of the firm, with the accruing interest; and for the residue, a note payable on demand, signed in the name of I. H. Burch & Co. for \$940, 93.

I am led to take this view of the case, by the intrinsic probabilities arising out of the relative situation of the parties; as well as from the responsive allegations of the answer, and the documentary proofs in the cause.

1st. Nothing is more probable than this hypothesis, when we look at the facts disclosed by the evidence. Walter L. Newberry and Isaac H. Burch, constituting the firm of Newberry & Burch, were exchange brokers, residing and doing business at Chicago. To procure funds to enable them to carry on this business, they had borrowed the sum of \$5000 of the Albany City Bank, upon a note dated on the 1st day of July, 1845, bearing two and a half per cent interest, upon certain conditions as to the circulation of the notes of the bank; and other \$5000 of the Herkimer County Bank, upon a similar note, bearing interest at three per cent. The notes were signed in the firm name, "*Newberry & Burch*," and by "*T. Burch & Co.*," *surety*; and were outstanding against the firm on the 1st of April, 1845. A large part of the business of Newberry & Burch consisted in selling drafts, payable at sight, on New-York; and to enable them to conduct this branch of their business, they made an arrangement with the house of J. T. Smith & Co., brokers, in the city of New-York, to accept and pay such drafts. It was a part of the arrangement that this house should be kept in funds for that purpose, by available paper which they were authorized to *collect*, and also to *sell*, and thus realize the proceeds upon it to meet the drafts that were liable to be presented, at all times, from Newberry & Burch.

In the course of the winter of 1845, Newberry had signified to his partner his intention to go out of the business, and to close the concern, so far as he was connected with it, in the

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succeeding spring. Burch being desirous of continuing the business at Chicago, came to the state of New-York previous to the first of April, in that year, and entered into an arrangement with his brother, the plaintiff in this cause, to form a copartnership with him, for the purpose of continuing the business at the same place, upon the dissolution and close of the existing copartnership with Newberry. Preparatory, therefore, to the closing up of the old firm, and doubtless also with a view to the formation of this anticipated connection with the plaintiff, he paid and took up the two notes above mentioned, on or about the first of April, by substituting similar notes made by himself individually, as *principal*, secured, as the former notes had been, by the signature of the firm, "T. Burch & Co., *surety*." After I. H. Burch had thus paid and taken up these notes, and on the 5th of April, he and the plaintiff executed articles of copartnership for the commencement of the business of exchange brokers in Chicago, by which the said I. H. Burch was to reside at Chicago, and conduct the business there, at a fixed salary, and by which the plaintiff was to become equally liable for the payment of the two substituted notes; and by which it was also provided that the said "*agreement should take effect on the first day of May, 1845.*" After the execution of this agreement, I. H. Burch returned to Chicago. On the 30th of April the old firm was dissolved; and on the first of May the new firm went into operation, and has since continued to prosecute its business at the same place. On that day the two notes which had been taken up by, and which had been receipted to, I. H. Burch individually, by the bank officers, were delivered to Newberry by him; each being receipted as follows: "*Received from Newberry & Burch, five thousand dollars in full payment of their note. The amount of thirty-seven $\frac{3}{4}$ dollars paid the* ——— Bank for interest due to 1st April, was paid with Newberry & Burch's funds. I. H. Burch." Here, then, was one partner who had paid liabilities of the firm to the amount of \$10,000, for which he was to be reimbursed by the firm at the close of their copartnership, which he here acknowledges himself to have received. If we ask, in what

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manner was he paid? The answer is obvious. He received his pay by way of a transfer of the effects of the firm then in the hands of J. T. Smith & Co., in New-York; and there being an excess of \$940,93 of the funds transferred, above the debts of the firm which I. H. B. had paid, the latter gave a note for that amount, payable on demand. This transfer was made available to Burch by a draft of N. & B. on Smith & Co. for \$3000 cash, and an order for the delivery of certain drafts called collection paper, specified therein, or the avails of such drafts, amounting to \$6228,88. Now this draft and order were made payable to *I. H. Burch & Co.*, (the name of the new firm,) and the note given for the balance of \$940,93 was also signed in the name of the new firm; and hence it is argued that this was in part a transaction between Newberry & Burch on the one side, and I. H. Burch & Co. on the other. This, however, seems to me to be by no means a reasonable conclusion. The new firm was coming into existence on the morning of the first of May, and I. H. B. desired they should be in funds in order to meet any drafts that might be drawn on their agent in New-York. And these funds which he was so receiving were by him designed to be immediately invested in the business of the new firm as a part of its capital. It was, then, perfectly natural, and far more convenient, for I. H. B. to take the drafts and order payable directly to the new firm instead of himself.

2d. This hypothesis is not only reconcilable with all the probabilities of the case, but is *conclusively proved*. (1.) The answer, which is responsive in most of its allegations upon this subject, positively asserts it. (2.) The articles of copartnership show that there was no firm of I. H. Burch & Co. in existence until the 1st of May. By the last provision of that agreement it was to take effect on the 1st of May. Till then it was *inchoate*; and had Thomas Burch, the plaintiff, died before the first of May, all the obligations which he had assumed, including the joint liability for the \$5000 notes, being dependant on the contemplated existence of the copartnership on the 1st of May, would have been defeated. I. H. Burch would have been *alone* liable as principal on the notes in question, and on

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the \$940,93 note, and he would have been the *sole owner* of the funds in the hands of J. T. Smith & Co., which he had received in payment for his advances for the benefit of the outgoing firm, and also of the draft and order which represented these funds. Indeed he *was* the *sole owner* until the 1st of May, and until then the *future joint ownership* was only a *mere possibility*. (3.) The *notes* which Isaac H. Burch had taken up had been *paid by him*, and were *receipted in full* by the bank officers, and were held by him, with those receipts on them, *merely as evidence* of the fact that he had paid them, and as his *vouchers* for such payment, as against the firm of Newberry & Burch and *not as subsisting securities* against the firm in his own behalf, and far less in the *behalf* of I. H. Burch & Co. These notes had *been paid* by one of the makers who was a *principal*, and not *purchased* by a stranger, or by a *surety*. The banks receipted these notes as *paid*, and did not *endorse* them as *transferred*. (4.) The exhibit, No. 4, is a document in the hand-writing of I. H. Burch, and signed by him in his individual name, by which the firm of Newberry & Burch is *charged* in account with him *individually* with the moneys paid to take up the said notes, and interest, and the \$940,93 note, making the sum of \$10,961,48; which sum is balanced by a credit of the draft and orders for the funds in the hands of Smith & Co. amounting to precisely the same sum. If the other evidence had left any doubt of the real nature of the transaction, this paper must dissipate it. It is evidence, of the most explicit character, that I. H. Burch was adjusting individually with his partner his claim against the firm for moneys advanced in behalf of it, and that he was receiving in satisfaction of such claim an assignment of the property of the firm in the hands of its agent in New-York, and that the draft and order were the mere instruments to evidence that transfer, and to make it available.

Now, although I entertain no doubt of the correctness of the conclusion I have formed as to the true character of the transaction in question, yet I will not stop to inquire whether the bill should be dismissed upon the ground that the plaintiff has

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failed to sustain by proof the case which he has made in the bill itself; because I prefer to place my decision upon the ground of merits alone; in other words, upon the question whether the plaintiff is entitled to any relief upon the case which he has made by the *proofs*.

Before proceeding to a consideration of that question, it may be proper to allude to several matters of fact which have been, to some extent, drawn in question upon the argument. (1.) It must be assumed as an undisputed fact in this cause, that the firm of Newberry & Burch had funds in the hands of Smith & Co. to the full amount called for by the draft and orders of the 30th of April. This fact is distinctly averred in the bill, and admitted in the answer; and it would not be competent, therefore, to disprove it without an amendment of the pleadings. And if it were disproved, it would be evidence of a fact, not within the issue; which the court would be bound to disregard. But the fact upon which the parties, in their pleadings, have agreed, is *not* disproved. It is true that the witness Underhill says, that by the *books of J. T. Smith & Co.* it did not *appear* that such a balance as was claimed was in the hands of that firm. This witness, however, admits that he did not suppose the books showed the true state of the accounts between the parties. In addition to the belief of this witness, we have most decisive evidence that they *did not*; for the books did not exhibit any account of the collection paper, nor of its proceeds. (2.) It is one of the grounds of complaint in the bill, and the same position was taken upon the hearing, that J. T. Smith & Co. were only authorized to *sell* the collection paper placed in their hands when it was *necessary* to meet the drafts drawn on them by Newberry & Burch, and that they had sold, without such necessity, and without authority, all but one of the drafts mentioned in the order aforesaid, and had converted the proceeds to their own use. Upon this assumption it is argued that when the order was drawn for the delivery of these collection drafts, or their avails, neither the drafts nor their avails were on hand; so that in fact the order called for property

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supposed by the contracting parties to be in the hands of Smith & Co., but which in truth had no existence.

I am of the opinion that Smith & Co. had authority to sell the drafts in question, and that it can not be successfully maintained that the "*avails*" were not in the hands of Smith & Co. on the 30th of April. (1.) The course of business between the firm of Newberry & Burch and their New-York correspondents gave a large discretion to the latter to make *sales* of these collection drafts. These drafts, drawn upon J. T. Smith & Co. by Newberry & Burch, were payable *at sight*, and were, at times, drawn to the amount of \$2000 or \$3000 a day, and to provide against emergencies it would be necessary to make collections or sales some days previous to the occurring of actual and known occasions for the use of the funds. Again; it must have been expected by the parties that the firm of Smith & Co. would have the benefit of a considerable deposit, inasmuch as they received no compensation for doing the business, except the use of the deposits, and a greater per cent. on the sale of paper. Again; it is inferable that a general authority was understood by Newberry & Burch, to be extended to Smith & Co. to sell at their discretion; for the reason that in several instances they were directed, by letter, not to sell *either certain specified paper, or at a greater discount than 6 per cent.*; it also appears that they had been directed to sell some of this very paper—and one of the firm of Smith & Co. is a witness, and testifies that in the spring of 1845 I. H. Burch was in New-York, and gave verbal directions "*to sell any paper of Newberry & Burch's, when it could be sold at a reasonable rate, or whenever their account required it.*" There is therefore no ground for saying that the sales were made without regular authority. (2.) Nor do I think there is any ground for saying that the *avails* of the collection paper were not in the hands of J. T. Smith & Co. on the 30th of April, when the *order* in question was drawn upon that firm. When this firm was *directed, or permitted* to sell collection paper, or when they received the proceeds of such paper on collection, it is not to be supposed that they were to make a separate deposit of

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the *specific funds* received by them on such sales or collection. On the contrary, the funds were expected to be mingled with their own, and all identity lost. The money proceeds would exist only in the character of a deposit, carried, indeed, in the accounts of the firm of Newberry & Burch, to their credit. Now it is true that the accounts had not been written up accurately, and the entries did not show the receipt of the proceeds of the collection paper, and did not exhibit the true balance that was due to Newberry & Burch. Nevertheless it was *positively sworn* by Mr. Underhill, that the house of Smith & Co. maintained a good credit, and paid all demands on them until the 16th of May, when they stopped payment. He further says that a draft for these proceeds, to their full amount, would have been paid, at sight, on any day prior to the 16th of May; that the firm had sufficient means and paid all demands upon them up to that day. If that were so, it cannot be denied that the *avails* of these collection drafts were on hand, both in the legal and commercial sense of the term, not in the shape of the *identical proceeds*, but in the shape of a *deposit* which would have been paid at any moment, on a legal demand. I, therefore, think that when Newberry & Burch assigned these drafts or *their avails*, a fund representing the drafts was in the hands of their agents, subject to be transferred by any lawful contract or assignment executed by the parties.

Now upon this state of the facts it seems to me that the plaintiff is entitled to no relief, for several conclusive reasons.

I. Deriving his title to relief under the order of the 30th of April, he becomes jointly interested with I. H. Burch in the fruits of *his* purchase of the partnership funds in question, and merely succeeds to an undivided moiety of *his* interest in the enterprise. I have already said that the transaction is to be regarded as an adjustment of a closing partnership concern, by which one partner agrees to pay a certain amount of partnership debts, and to receive a certain amount of partnership funds as an equivalent. In this case, it is true that Burch had *already discharged*, instead of *then assuming*, the stipulated portion of the firm liabilities; and it is also true that the amount

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of partnership effects exceeded the amount of partnership debts assigned or paid, and, as to that balance, the transaction was strictly a purchase; but neither of these circumstances altered the rights or the liabilities of the parties. The agreement was a fair one, without fraud or warranty, and as the partnership fund, thus purchased, was, as we have already seen, then in the hands of the agent of the firm, both parties are bound by this agreement; and the loss of the fund, by the failure of these agents 16 days later, furnishes no ground for relief under the contract. The paper marked exhibit No. 4, is written evidence of the contract, and of the transfer of the fund in question; and the order and draft were merely instruments to make the transfer available; a mere authority to the agents to deliver over the fund to the purchasers.

II. Independently of the ground which I have just considered, it seems to me that there is another and a decisive objection to the relief sought by the plaintiff. On the 30th of April N. & B. gave I. H. B. & Co. the order on Smith & Co. to deliver over the collection paper, or *its avails*. The \$3000 draft was transmitted to Smith & Co. by the morning mail of the 1st of May. At a later period of the same day I. H. B. & Co. addressed another communication to Smith & Co. in which, among other things, they request that firm to "*acknowledge the receipt of the paper called for by that order, specifying the items and time of maturity, and to hold them for collection, for our account.*" On the 9th of May Smith & Co. answered the other parts of this communication of I. H. B. & Co. and added, "*we have not time to-day to examine N. & B.'s order for the paper; will refer in our next.*" Now it is not denied that if Smith & Co. had found time to comply with this request of I. H. B. & Co. and had actually acknowledged the receipt of the paper or its avails, and that they held it for the new firm, the loss must have fallen upon the latter. I think it will also be admitted that the ground upon which this loss must have been borne by the new firm, would have been that such an acknowledgment of the receipt of this fund would have either transferred, or have been evidence of a transfer of, the *right of property in*

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the fund to that firm; so that the firm would thereby become the owners of that fund, and therefore, to that amount, the creditors of J. T. Smith & Co. when that firm failed. If then it can be established that the right of property in that fund passed to the new firm, notwithstanding the omission of such acknowledgment, the same consequence must inevitably follow. I am of the opinion that it did for the following reasons. (1.) Mr. Chitty defines a bill of exchange to be "an open letter of *request* from, and *order* by, one person on another to pay a sum of money mentioned therein, to a third person. It operates as an *assignment* to a third person of a debt due to the person drawing, from the person upon whom it is drawn." (*Chit. on Bills*, 21. 1 *B. & P.* 291, 664. 1 *H. Bl.* 602.) This doubtless is intended to apply to bills only after their acceptance. As to a *general bill* of exchange, there may still be some doubt of the extent of the application of this principle. In the cause of *Harrison v. Williamson*, (2 *Edw. Ch. Rep.* 430,) the late vice chancellor of the first circuit denied that a general bill of exchange would operate as an assignment of the money, for which it is drawn, in the hands of the drawee. But he seems to admit that such would be the effect of a bill drawn upon a *special fund*. In *Peyton v. Hallet*, (1 *Caines*, 379,) it was held that after the *presentment* of an order to a person having the funds of the drawer in his hands, such presentment operated as an assignment of the funds, to the extent of the order; and that after such presentment, the drawee could not legally part with such funds to the drawer, or any other person. So when a bill is drawn upon special funds, the authority in the drawee to pay it is not revoked by the death of the drawer before presentment of the bill. (See *Cutts v. Perkins*, 12 *Mass. Rep.* 206; *Debesse v. Napier*, 1 *McCord*, 106.) The order now under consideration is not a bill of exchange. It calls for *specific securities* if they have not been converted into money; and in that event, for the *avails* of such securities, without stating the sum. Again; it is not merely an order *on* a special fund, but *for* the special fund, and the whole of it. It is therefore an *assignment* of it; especially after its *presentment*. It should be

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borne in mind, also, that when this presentment was made there was *no refusal to accept*; but as the *peculiar kind of acceptance* called for by the letter of I. H. B. & Co. required time to make an examination in relation to the particulars to be embraced in the acknowledgment of the receipt of the paper or its avails, the house of Smith & Co. merely *deferred* giving the acknowledgement till their next communication. Instead of a *refusal* to comply with the order, it should be regarded as an acquiescence in its directions, with a postponement of an immediate compliance with them. This order, therefore, after its presentment, transferred the property in this fund to I. H. Burch & Co. That firm was so completely vested with the title *to*, and the property *in* this fund, that, as to such specific securities as remained undisposed of, an action of trover would have lain, in the name of that firm, against Smith & Co., for a refusal to deliver them. And if an action for money had and received would not lie, in the name of I. H. Burch & Co. on a refusal to deliver the proceeds of such securities as had been sold, it is not because the property in the fund had not passed, but solely because the subject matter of the assignment was a chose in action, and the absence of an express promise on the part of Smith & Co. The following cases show how far the courts have gone in entertaining the action for money had and received in cases somewhat analogous to this. (12 *John.* 276. 14 *East*, 59. 1 *Maule & Sel.* 714. 2 *Camp.* 176. 4 *Id.* 176. 17 *Mass. Rep.* 575. 2 *Denio*, 45.)

It is, however, not material that I. H. B. & Co. should be able to maintain an action for this money, *at law*, in *their own names*. Their right to the fund was *absolute and perfect*. The firm of N. & B. had no control over it, and Smith & Co. could not divert it, in obedience to their direction, or otherwise, without being responsible to the holders of the order. The court of chancery affords full and ample protection to the assignee of a chose in action. I am of the opinion, therefore, that the new firm were the absolute owners of the entire beneficial interest in this fund, and of course must sustain the loss of it. (2.) Again; it is to be remembered that the *sola ground*

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upon which it is insisted that the loss of the fund in question should fall on the old firm, is because J. T. Smith & Co. did not, on the receipt of the order, either give an acknowledgment that they held it for the new firm, or pass the amount of it to the credit of that firm on their books. These acts, however, merely amount to a *recognition by, and an evidence against*, Smith & Co., as between that house and the new firm, of the rights of the latter, and could not *create* any new or greater rights to the property of the fund than had already been acquired by the order which assigned it. Nevertheless it was the duty of Smith & Co., as the agents of the old firm, to obey its orders, and as the agents of the new firm, to comply with its directions. It was virtually agreed to be done; it was directed to be done by the parties having the authority to give such directions, and it was clearly the duty of the agent to perform the act so directed to be done. Now it is a general maxim of the court of chancery, that equity regards whatever is ordered to be done by one having authority, as by a testator in his will, or what ought to be done, as *actually done*. (See 1 *Story's Eq. Jur.* 79, § 61.) Mr. Story says, in this section, that "the true meaning of this maxim is that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties *had been executed exactly as they ought to have been*." Again, on page 80, he says, "The most common cases of the application of the rule are under agreements. All agreements are *considered as performed*, in favor of persons entitled to insist upon their performance: they are to be considered as *done at the time* when, *according to the terms thereof*, they ought to have been performed." The author then speaks of the consequences flowing from the application of this principle, which are, that the rights and liabilities of the parties are to be determined as though the act had actually been performed in due time; so that neither party shall derive any benefit, or sustain any loss by reason of any laches or neglect. In my judgment, the case under consideration is a proper one for the application of this maxim, although I am

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not aware of any adjudication sustaining its application to a case precisely like this. The omission to pass the proceeds of this collection paper to the credit of the new firm, and to give a written acknowledgment of holding the fund for such firm, was the neglect of a *common agent of both firms*. As the agent of the old firm, the house of Smith & Co. was bound to *deliver the collection paper, or its avails, to I. H. B. & Co.* And had a person properly authorized by that firm, made a demand that the said paper, or its avails, should *actually be delivered over*, the omission to comply with such demand would have been chargeable upon N. & B. as the act of *their agent*; but when, instead of such demand, made by a person prepared to receive the said paper or its avails, I. H. B. & Co. send the orders to Smith & Co. with directions to receive the fund in question by transferring it on their books, and by giving a written acknowledgment of its receipt, it will be seen that the act of making the *demand, receiving the fund, and acknowledging the receipt*, were all to be performed in the *behalf and as the agents of I. H. B. & Co.* J. T. Smith & Co., therefore, being requested to deliver and receive the fund themselves, for the new firm, are to be regarded as having performed that duty, inasmuch as they *had the money in their possession*. Having it in their possession then, upon the receipt of the order, and of the letter of I. H. B. & Co., *they were thenceforward the holders of the fund*, as the agents of that firm; and the omission to place it formally to the credit of the new firm, and to acknowledge the holding of it for that firm, was the neglect of an act to be done as the agent solely of I. H. Burch & Co. By the omission of that act, therefore, N. & B. should not be prejudiced.

III. Again; upon the most favorable view of this case for the plaintiff, the loss must fall upon him if he has been wanting in due diligence in making the proper presentment and demand of the order of the 30th of April; and if the defendant has sustained damages by such neglect.

There is no evidence in the case showing that the defendant Newberry in any manner directed, or assented to the manner in which I. H. B. & Co. chose to make presentment and de-

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mand of the order upon the house of J. T. Smith & Co. It was for the payee of that order to use reasonable diligence in presenting and demanding payment of the drawees. Now, independently of the rules which have been established in relation to the diligence required of the holders of commercial paper, it seems to me that there can be but one opinion as to the conduct of the holders in this case. It seems to be a very clear proposition that a demand of payment made by John T. Smith & Co. of themselves is no demand at all. A demand should have been made by some third person authorized to *receive the actual possession of the fund*. The drawers of the order have a right to insist upon such a demand as, if complied with, would divest the drawees of the possession of the fund, and thus discharge them of their responsibility for any subsequent loss. The firm of N. & B. ordered the house of Smith & Co. to *deliver to I. H. B. & Co. the paper, or its avails*. Upon this order Smith & Co. were legally bound to make a *delivery* of this paper, or its avails, to *the new firm, or its authorized agent*, on due presentment and demand; but they were under no obligations to do any thing else. They were not bound to open a new account with I. H. B. & Co., to pass this fund to their credit, and to give a receipt acknowledging the holding of the fund on the behalf of their new correspondents. They might be very willing to contract with the new firm to perform these duties; but they owed no such obligations to the firm of N. & B., nor did the order of N. & B. require of them the performance of any such act. There was, therefore, no such demand as the law contemplates when it holds a party to the use of a reasonable measure of diligence. I entertain but little doubt that had the proper and usual demand been made, the loss that has occasioned this litigation would have been avoided. Had a stranger presented this order for the delivery of the collection paper, or its avails, it is said by the witness Underhill that he should have taken time to examine the account of N. & B., and if that account had been found good, the avails of the paper would have been paid over at any time before the 16th of May. Now the fact that these agents *did not in fact*

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examine that account, and make the *requisite returns to Chicago* before the 16th of May, affords no sufficient evidence that this examination would not have been made immediately on the demand, if the presentment and demand had been made *personally*, by an authorized agent in the city of New-York. In that event there is every reason to believe that the requisite examination would have been made immediately, and the money paid on the spot; or at least, that the examination would have been made on that day, and an appointment made with the agent presenting the order, for the payment of the balance found due, on the next day. A greater delay than this would have been incompatible with the prompt habits of commercial men in good credit in the city of New-York. The testimony of the witness Underhill is positive that the avails of the paper in question would have been promptly paid at any time prior to the 16th of May, and is entirely incompatible with the idea that there would have been any delay in making such examination with the view of avoiding the necessity of paying over the amount found due.

In answer to this argument it may be urged, that neither Newberry nor I. H. Burch had any reason to suspect the solvency of the house of John T. Smith & Co., and that I. H. Burch & Co. chose to allow the money to remain in their hands as a deposit against which to draw in the prosecution of their business as exchange brokers. This doubtless was the true reason why this fund was not withdrawn from the possession of J. T. Smith & Co. as it would have been under other circumstances. That, however, furnishes no reason for devolving this loss upon the defendant. If the firm of I. H. B. and Co., when they received this order, intended to hold the drawers responsible upon it for the insolvency of the drawees, then they should have pursued the usual course for removing the fund from the possession of the latter; and if there be good reasons to believe that the usual and ordinary demand, by a third person, would have resulted in a payment prior to the 16th of May, then the defendant should be discharged. There is also an additional ground for holding the new firm to this reasonable

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measure of diligence, because it is more than probable that had it not been for the agreement which resulted in the giving of this order to the new firm, the defendant, upon the closing of his business as a broker, and having no farther use for this fund in the hands of his former agents, would have withdrawn it on the 1st of May.

The bill must be dismissed, with costs.

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A

ABATEMENT.

1. The death of one of several defendants is an abatement of the suit as to himself alone. And pending an abatement by the death of one defendant even process of contempt may be executed against the other. *Brown v. Andrews*, 227
2. The appointment of a person as consul of a foreign power, does not work an abatement of a suit previously commenced against him in a state court. *Koppel v. Heinrichs*, 449

ACCEPTANCE.

See *BILLS OF EXCHANGE*, 2, 3.

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MONEY HAD AND RECEIVED.

AD QUOD DAMNUM.

See *INQUESTIONS*, 1.

ADULTERY.

See *DIVORCE*.

AFFIDAVIT.

1. *To obtain an attachment against an absconding debtor.*
1. Where a creditor applied to a justice of the peace for an attachment against his debtor, and made an affidavit, which stated, that the debtor was indebted to him in the sum of \$16, arising on contract, over and above all discounts; that the debtor had told him that he was going to leave the county, and go to Canada, and, as the creditor believed, with an intent to defraud his creditors, and that he was about to take with him all his property; *Held*, that the affidavit was sufficient to authorize the issuing of an attachment. *Fulton v. Heaton*, 552
2. An affidavit is sufficient to authorize an attachment, although the creditor merely swears to his belief as to the intent of the debtor to defraud his creditors, if he states positively the facts and circumstances on which such belief is founded. *ib*
2. *To hold to bail.*
3. Where a judge's order is necessary for holding the defendant to bail in actions of tort, something more must be stated in the affidavit than merely a cause of action. Some special cause must be shown, in addition. *Brooks v. McLellan*, 247
3. *Of merits.* See *DEFAULT*, 1.
4. *Of truth of amendments to bill.*
- See *AMENDMENTS*, 5.

5. *How entitled.*

4. Attachments against parties to the suit, and the affidavits on which they are grounded, and the subsequent proceedings, should be entitled in the cause. *Brown v. Andrews*, 227

AGREEMENT.

1. *Construction of.*

1. Where a warrant of attorney was absolute upon its face, but upon the back of it there was an endorsement, signed by the defendant, stating that the judgment to be entered thereon was intended to secure an indebtedness of \$500 for goods to be sold on the day of the date of the warrant of attorney, and also to secure a similar amount for goods thereafter to be sold; and it was agreed that in case the plaintiff should deem himself insecure, he might issue execution for whatever sum might be due to him, for principal and interest; *Held* that the general expressions must be taken in connection with the particular provisions of the agreement; and that the plaintiff was only authorized to issue execution for the amounts intended to be secured by the judgment, and not for any indebtedness which had accrued previous to the time of executing the warrant of attorney. *Chapin v. Clemitson*, 311
2. Upon the dissolution of a copartnership between S. & P. an agreement was entered into by them, by which it was stipulated that the business of the firm should be settled by S., and that all the personal property, books and effects of the firm should be delivered over to him, and that he should provide for, and pay, all the debts and liabilities, and charge the same to the firm. By the fifth clause of the agreement, it was provided that when all the debts and liabilities of the firm should be paid and discharged, then the accounts of the partners should be made equal by S. selecting and taking to his own account, from the assets or effects of the firm, an amount sufficient to equalize the accounts of the partners, with interest, (P. being indebted to the firm;) and that the balance of the assets and property of the firm should belong to, and be immediately divided equally between the parties. At the time the agreement was executed, the effects of

the partnership exceeded, by more than \$26,000, its debts and liabilities. And the parties did not contemplate a deficiency of assets to pay the debts and equalize the partnership accounts. All the debts having been paid, debts to the amount of about \$26,000 still remained due to the firm, most of which were uncollectible. A balance of \$1568.98 being still due from the firm to S., he filed his bill against P., praying for an account and a settlement of the copartnership affairs, and that P. might be decreed to pay the balance which should be found due from him. *Held* that there was nothing in the language of the agreement which furnished any evidence that S. intended to release P. from his liability to contribute his share towards the losses of the partnership; or that P. was stipulating for an indemnity against his liability to pay any balance which might be justly due from him to his copartner, after a full administration of the partnership effects. Nor that either party intended, or expected S. would take to his own account, in payment of any portion of the amount due him from the partnership, doubtful or uncollectible debts, at their nominal value. *Sayre v. Peck*, 464

3. *Held also*, that the deficiency of the partnership effects to pay the debts and liabilities of the firm, and then to pay S. the amount which should be due to him from the firm, was assumed as the basis of the agreement. That those effects having turned out to be insufficient for those purposes, it was a case of mutual mistake or misapprehension as to the value of those effects. And that it would be doing violence to the intention of the parties to make the agreement applicable to the existing state of things.
4. Where a written contract is capable of a sensible construction, and there has been no fraud or imposition in obtaining it, such construction must be determined by the language found in the instrument itself, and cannot be affected by parol evidence of what was said by the parties at, or before, the time of execution.
5. In the interpretation of a contract, and for the purpose of ascertaining the intentions of the parties, it is allowable for the court to resort to the extrinsic circumstances which surround the transaction, and thus to place itself in

the situation of the contracting parties, whose language it is called upon to construe. *Hasbrook v. Paddock*, 635

2. *Within the statute of frauds.*

6. A parol executory agreement for the sale of a judgment, for a sum exceeding \$50, where no part of the evidences thereof are accepted or received, by the buyer, and no part of the purchase money is paid, is within the statute of frauds. *The People v. Beebe*, 379

7. Where a party files a bill against another for an account and payment of moneys obtained from him by the latter, upon pretence of paying for lands purchased on joint account, in pursuance of a parol agreement between the parties, but which moneys were not in fact applied for that purpose, the defendant cannot set up the objection that the agreement under which the lands were purchased was by parol, and therefore void by the statute of frauds. *Willink v. Vanderpeer*, 599

8. Where the plaintiff's claim rests upon actual fraud, such fraud may always be proved by parol; even to avoid the statute of frauds. *ib*

3. *For exchange of lands.*

9. A party to an agreement for the exchange of lands, for leasehold premises, will not be permitted to repudiate the contract, after having enjoyed the leasehold premises assigned to him, for years, without disturbance, and after the other party has expended large sums in improvements upon the land received in exchange by him; on the ground that a legal forfeiture had been incurred by such other party, previous to the exchange, which has given to the lessors a right to re-enter into the leasehold premises; especially in a case where such forfeiture, if any, had occurred by means of the use of the land for a purpose, and in a manner, known to the objecting party, and by virtue of a public law of which he was bound to take notice. *Hasbrook v. Paddock*, 635

4. *Substituted agreement.*

10. Where a bill is filed to enforce the performance of a written contract, and the defendant sets up the defence that the contract sought to be enforced is different from that agreed upon between the parties, he must, in order to

sustain that defence, show that the spurious was substituted for the real contract, through mistake, or fraud. *Ferussac v. Thorn*, 42

5. *Specific performance.*

11. Where a party makes a contract for the sale of land, and dies before the performance of the contract, leaving an only child as his heir at law, who is a lunatic, a court of equity has power to decree a specific performance of the contract, and to direct the committee of the lunatic to execute all necessary conveyances, for the purpose. *Swartscout v. Burr*, 495

See *CORR*, 1, 2.

6. *Rescinding.*

12. Where a person about to purchase a farm was ignorant of the actual character and capabilities of the land, and had no means of obtaining such knowledge except by information to be derived from others; and the owner, with a knowledge that the purchaser's object was to obtain an early farm, and that his farm was not as early as the lands lying in the neighborhood, represented to such purchaser "that there was no earlier land any where about there," and the latter, relying upon the truth of that representation, made the purchase; and after ascertaining by actual experiment, that the land was not what it had been represented to be, he applied to the vendor, within a reasonable time, to rescind the bargain, who refused to do so; *Held*, that this furnished a sufficient ground for the interference of a court of equity, to rescind the contract; even though there was no intention on the part of the vendor to deceive the purchaser. *Taylor v. Fleet*, 471

13. Whatever may have been the motive of a vendor in making erroneous representations respecting land about to be sold by him, it is enough to entitle the purchaser to relief, that there was a misrepresentation of a matter of fact, material to the subject of negotiation, and which constituted the very basis of the contract. *ib*

14. To avoid a contract on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have made the contract upon the faith and

credit of such representations. At least, he must so far have relied upon them as that he would not have made the purchase if such representations had not been made. *ib*

15. If a purchaser has acted upon his own judgment, and has not been influenced by the misrepresentations of the vendor, however untrue they may have been, he has no right to be released from his bargain. *ib*

16. Where a purchaser applies for a rescission of a contract, on account of the false representations of the vendor, it is not necessary he should prove the express representations stated in the bill of complaint. It is sufficient to prove words of equivalent import. *ib*

17. Where, between the time of making a contract of purchase and applying to rescind it, great changes have taken place in the character and value of the property, the lapse of time is an important consideration. But where no material change in the property has occurred, and it may be restored in as good a condition as when the purchaser received it, and he has offered to rescind the contract within a reasonable time, the lapse of time furnishes no well grounded objection to a bill for a rescission. *ib*

7. Waiver of.

18. It is well settled that a written contract may be waived by parol. And after a contract has been thus waived by one of the parties, neither he nor any one acting under him can resuscitate it. *Wood v. Perry*, 114

19. There may be an effectual waiver by parol of a condition specified in a written, or even in a sealed contract. *The Mayor, &c. of New-York v. Butler*, 326

ALIMONY.

1. It is not a matter of course to order the payment of alimony, in suits for a separation merely. *Hollerman v. Hollerman*, 64

2. The court must be satisfied that an allowance would be proper, and that some provision is necessary to enable the wife to establish her just rights. *ib*

3. An allowance will not be made where

no ill treatment of the wife, by her husband, is shown, and where it appears that she has left him without just cause, and insists upon living separate from him. *ib*

4. The granting of an allowance to the wife for alimony and expenses in suits for a divorce, or for a separation, is in the discretion of the court. But the rules which govern the court in the exercise of that discretion are very different in the two cases. *Bissell v. Bissell*, 430

5. Where a bill is filed for a divorce, the wife is entitled of course to an allowance for alimony and expenses; unless there is an undenied charge of adultery against her. But if the bill is filed by the wife for a separation, it is so far from being a matter of course to allow her alimony and expenses, that it must at least appear that the plaintiff had good ground for bringing the suit. *ib*

AMENDMENTS.

1. Declaration.

1. The 96th rule of the supreme court, adopted in 1837, being omitted in the revision of 1847, a plaintiff may now amend his declaration by adding a defendant, after a plea in abatement founded upon the non-joinder. *Powell v. Myers*, 438

2. A plaintiff has the same right to amend his declaration after a plea in abatement for want of parties, as in any other case. The only restriction imposed upon the plaintiff's right to amend, under the present 22d rule, is that contained in the 23d rule. *ib*

2. Bill of complaint.

3. If the plaintiff amends his bill, by adding new parties, after the defendant's default for want of an appearance has been entered, he thereby waives the default. *Scudder v. Voorhis*, 55

4. An amendment of an injunction bill will not be permitted unless a sufficient reason is shown why the matters stated in the proposed amendments were not inserted in the original bill; nor unless the proposed amendments are verified by oath, as the bill is required to be verified. *Gunn v. Blair*, 539

5. An affidavit of the complainant stating

that she is advised by counsel, and verily believes it to be true, that it is important and necessary, in order to protect her rights fully, and to enable the court to do justice in the premises, that her bill should be amended as proposed, is not a sufficient verification of the amendments. *ib*

3. *The record.*

6. If the court below sees fit to correct an error, in the form of its record, it is a matter of course for the supreme court to allow the copy of such record which had been sent to that court previous to the amendment, to be also amended. *Layton v. Sniffen*, 428

7. But such amendments should only be allowed on such terms as will prevent injustice. *ib*

8. Where a judgment was recovered upon a bond and warrant of attorney, and at the time the judgment record was left at the clerk's office, to be docketed, the attorney omitted to leave the warrant of attorney, but left it the next day, in the office; from which place it was taken away by another person, through mistake, and lost, and the clerk docketed the judgment without having previously signed the record; *Held* that these were errors which the court had power to remedy, by permitting an amendment of the record. *Williams v. Wheeler*, 48

9. The section of the revised statutes which declares that no judgment shall be deemed valid, so as to authorize any proceedings thereon, until the record shall be signed and filed, and the sections respecting amendments, having been passed at the same time, are to be regarded as *in pari materia*; and they do not conflict with the power of the court to permit an amendment, under the latter sections, even in a case where, under the former, the proceedings would, without an amendment, be invalid. *ib*

4. *In justices' courts.*

10. Justices' courts possess the same powers, as to amendments, as courts of record. *Fulton v. Heaton*, 552

11. Justices are required to allow amendments, especially in all cases where the rights and interests of the adverse party will not thereby be put in jeopardy. *ib*

ANSWER.

See CREDITOR'S BILL, 2.
PLEADING, 9, 10, 11, 12.

APPEAL.

1. Appeals from the sentences or decrees of surrogates to circuit judges, pending before such circuit judges on the first Monday of July, 1847, were not transferred to the supreme court by the new constitution, nor by the judiciary act of 1847. *Butler v. Benson*, 526

2. Such appeals were special proceedings pending before the circuit judges, and were provided for by the 76th section of the judiciary act. They may, by an order of the supreme court, be transferred to any justice thereof, but cannot be heard by the supreme court itself; except upon an appeal from the decision of the justice. *ib*

ARBITRATION AND AWARD.

I. *SUBMISSION.*

1. The form of a submission to arbitration is a matter of indifference. It is sufficient if it appears, from the acts of the parties, that they intended to arbitrate, and that the decision of the arbitrators should have the effect of an award. *Brady v. The Mayor, &c. of Brooklyn*, 584

2. Where there are no arbitration bonds given, upon a submission to arbitrators, the proceedings upon the reference are considered as a statement of accounts between the parties, and an admission of the balance due. In such a case the award can be given in evidence under the money counts, and particularly as an account stated. *ib*

3. A submission to arbitration may be made by a corporation, by a resolution or ordinance adopted at a meeting thereof. It need not be under the corporate seal. *ib*

II. *WHO MAY ARBITRATE.*

4. Where there is a capacity to contract, with a liability to pay, there is generally a power to arbitrate. And the fact that one of the parties is a corporation makes no difference. *ib*

III. APPOINTMENT OF ARBITRATORS.

5. An appointment of arbitrators, originally good, may become void by subsequent events. *The Mayor, &c. of New-York v. Butler*, 325

IV. NOTICE OF THE TIME AND PLACE OF MEETING.

6. An award is not rendered void merely because it does not appear from the award that one of the parties had notice of the time and place when and where the arbitrators met. A want of such notice may be proved, or it may appear expressly from the award; and then the objection would be fatal. But where it does not appear, it will not be presumed. *ib*

V. POWER OF ARBITRATORS.

1. Appointment of umpire.

7. Where appraisers are chosen by parties to determine the amount of a claim arising under an agreement between them, with power to such appraisers to appoint an umpire to decide between them in case of their disagreement, they may appoint such umpire immediately, without waiting until a disagreement has arisen between them. *ib*

2. Imposing conditions on payment of amount awarded.

8. Where a submission merely authorizes the arbitrators to determine the amount due to one of the parties, they are only authorized to ascertain and fix that amount. They have no right to impose any condition upon the payment of it. *ib*

3. Confined to submission.

9. Where a submission to arbitrators of a claim arising upon a building contract, on the part of the builder, relates exclusively to the additional cost occasioned by an alteration in the form or construction of the building as contemplated by the original design, the umpire has no right to make allowances, by way of deduction against the builder, for workmanship and materials alleged to be defective in those parts of the building not embraced in, or affected by, the alterations; especially where the claim of the builder for constructing those parts of the building has been settled, and paid. *ib*

4. Parol evidence to show that it has been exceeded.

10. Where an award is indefinite as to the subjects investigated and determined, parol evidence is admissible to show that the arbitrator has exceeded his authority, and that therefore his award is null and void. *ib*

5. When spent.

11. After arbitrators have made a void award, a party has a right to consider the powers conferred upon them as virtually annulled, and to call for the selection of new arbitrators. He is not bound to renew the investigation before arbitrators who have already formed an opinion, and expressed it in a solemn manner. *ib*

12. Where an agreement provides that certain claims arising under the same shall be submitted to arbitrators, for their determination, and an actual submission to arbitrators is made accordingly, which proves ineffectual, and the award made by them is null and void, and the arbitrators have become virtually incompetent to act, the rights of the parties remain the same as if there had been no appointment, or award, at all. And if, in such a case, either party refuses to join the other in making a new selection of arbitrators, he may be sued in an action at law by the other party, to recover the amount of his demand. *ib*

VI. THE AWARD.

1. Signature.

13. It is not a valid objection to an award made upon a submission to appraisers, with power to them to appoint an umpire, that one of the appraisers signed the same, with the umpire. The authority originally given to the appraisers ceases upon the appointment of an umpire by them; and if either of them subsequently signs the award, his signature is a mere nullity. The award is the act of the umpire. *ib*

2. Form of.

14. Where the operative part of an award differs, in terms, from the submission, but the recital refers correctly to the submission, the recital will raise a presumption that the award is in accordance with the submission. But the inference is not very strong, and may be rebutted. *ib*

3. *When it may be impeached by evidence of arbitrator.*

15. It is well settled that the evidence of an arbitrator cannot be received to impeach his own award. But the rule does not apply to a person originally appointed an arbitrator, but whose powers have been terminated by the appointment of an umpire, by whom the award was made. *ib*

16. The testimony of an arbitrator may be received to show that the arbitrators did not take a particular subject matter into consideration. That would not be an impeachment of the award, unless *malis fides* should be alleged. *ib*

4. *Where it includes matters not submitted.*

17. If it appears from the face of an award that the arbitrators have included in it matters not referred to them, it is void, unless the amount of the items properly allowed can be ascertained, and separated from those not allowable. *ib*

ASSIGNMENT.

See DEBTOR AND CREDITOR, 1, 2, 3, 4, 5, 6, 10, 11.
PARTNERSHIP, 1, 2, 5.

ASSIGNOR AND ASSIGNEE.

1. An assignee of a specialty cannot maintain an action upon it, at law, in his own name, without an express promise of payment to him, by the original debtor. *Hudson v. Reeve*, 89

2. An assignee of a contract takes the same subject to all existing equities in favor of the other party, against the assignor; although such assignee may not have received any notice of them at the time. *Wood v. Perry*, 114

See DEBTOR AND CREDITOR, 1, 2, 3, 4, 5, 6.

ATTACHMENTS.

Although an attachment is founded on a defective affidavit, if it is regular and legal on its face, and apparently within the jurisdiction of the justice, it will be

a complete justification to the officer who executes it. *Fulton v. Heaton*, 552

See AFFIDAVIT, 1, 2.

B

BAIL.

A resident of the state will not be held to bail, unless evidence is produced to justify the apprehension that he will not be within the jurisdiction of the court, to answer the plaintiff's demand, when judgment shall be obtained against him. *Brooks v. McLellan*, 247

See AFFIDAVIT, 3.

BELIEF.

See EVIDENCE, 7.

BILL OF COMPLAINT.

See AMENDMENTS, 3, 4, 5.
CREDITOR'S SUIT, 1.

BILL OF DISCOVERY.

1. To maintain a bill of discovery in aid of a defence at law, the plaintiff must state a case which, if established, would constitute a good defence at law; and he must then state some fact, material to such defence, which he wishes to establish by the confession of the defendant. *Niewry v. O'Hara*, 484

2. The refusal of a court of law to allow a defendant a further bill of particulars of the plaintiff's demand, will not authorize such defendant to file a bill of discovery in a court of equity, as to the grounds of the suit at law; where the bill shows no right to any discovery, and sets forth no matter material to the defence at law. *ib*

3. A mere fishing bill, the sole object of which is to ascertain the grounds upon which the defendant has thought fit to commence an action at law against the plaintiff, will not be sustained. *ib*

BILL OF EXCEPTIONS.

See PRACTICE, 12, 13.

BILLS OF EXCHANGE.

1. *What is a bill of exchange.*

1. The payee of an instrument in these words, "New-York, May 12, 1837. Messrs. J. S. B. & J. Gent. Please deliver to C. B. jr. thirty-six dozen Stone & Co. axes. D. E. S. & Co.," on the face of which was written "accepted, J. S. B. & J.—when called for," cannot recover upon the same, against the acceptors, under the common money counts. *Burrall v. Jacot*, 165

2. The acceptance of such an order, by the persons upon whom it is drawn, will not amount to a sale of the axes specified therein, to the payee. *ib*

3. Such an acceptance amounts only to a promise to deliver the property at a future time, on request. It is a special undertaking; and in order to recover upon it, the payee must declare upon it as such. *ib*

2. *What amounts to an endorsement.*

4. A person who puts his name upon a negotiable note—in the absence of clear and direct evidence of an intention to become a joint maker or guarantor thereof—is to be regarded only in the light of an endorser; and as assuming no other responsibility than that which an ordinary endorsement of a negotiable note imports. *Gilmore v. Spies*, 158

3. *Demand and notice.*

5. Where a note, specifying no place of payment, was made and endorsed in the city of New-York, where it bore date, by persons residing in Mexico at the time, and who continued to reside there until the note became due; and the fact of their residing in Mexico was known to the holder of the note, yet he took no steps to have the note presented for payment at their place of residence, when it became payable, but kept it in his possession in the city of New-York, and merely gave notice, by letter, to the maker and endorser that the note was due and not paid; *Held* that this was not such a demand, and notice of non-payment, as the law requires, to charge the endorser. *ib*

6. The circumstance that the maker of a

note resides in a foreign country, affords no excuse to the payee, or holder, for not following him with the note and demanding payment there, so far as the endorser is concerned; unless the payee or holder has protected himself from the necessity of doing so, by specifying some other place of payment, in the body of the note. *ib*

7. The holder of a note not payable at any particular place, must present the same for payment, at maturity, at the known place of residence of the maker, though it be in a foreign country; if he means to hold the endorser. *ib*

4. *Holder, how far protected.*

8. In order that the holder of a negotiable security which has been passed to him in fraud of the rights of others, may be protected, he must not only have taken it without notice, but he must also have parted with something of actual value on the credit or faith thereof. *White v. The Springfield Bank*, 225

9. Merely receiving it as security for, or in payment of, an antecedent debt, is not sufficient. *ib*

See DEBTOR AND CREDITOR, 16.
PARTNERSHIP.

BILL OF PARTICULARS.

See PRACTICE, 6, 7, 8, 9, 10.

BONA FIDE HOLDER.

See BILLS OF EXCHANGE, 8.

BOND.

See INJUNCTION, 9.

BROOKLYN.

See STREETS, 3, 5, 6, 8, 11, 12.

C

CASES COMMENTED ON.

The syllabus of the reporter to the case of *Reab v. McAlister*, (4 Wend. 483,) corrected. *Esterly v. Cole*, 235

CERTIORARI.

1. It is in the discretion of the court either to allow a writ of certiorari in the first instance, or to grant an order to show cause. *Matter of Bruni*, 187
2. The supreme court has power to review, upon certiorari, the proceedings of a magistrate of this state who, while professing to exercise a jurisdiction conferred by act of congress, acts in the name of the people of this state, by writs of the people, directed to state officers. *ib*
3. If the objection, that a joint plea of justification, in which an officer and a co-defendant united in a justice's court, failed as to the officer, in consequence of its having failed as a defence as to the co-defendant, was not taken before the justice, it cannot be taken on certiorari. *Fulton v. Heaton*, 552

CHATTEL MORTGAGES.

1. Whether a chattel mortgage can be given on growing trees, fruit or grass, while parcels of the real estate; and whether such mortgage can be given on the produce of real estate not in actual existence at the time of the execution of the mortgage? *Quære. Bank of Lansingburgh v. Cray*, 542
2. Until a chattel mortgage becomes absolute, by the non-performance of the conditions of the mortgage, the mortgagor has such an interest in the chattels mortgaged, as is liable to levy and sale on execution; and the purchaser at the sale on execution takes the property subject to the mortgage, and acquires with it the right to redeem it by the payment of the amount due on the mortgage. *ib*

CHATTELS.

See EXECUTION.

COGNOVIT.

See JUDGMENTS, 1.

COMMISSION OF REBELLION.

See PRACTICE, 16.

COMMISSIONERS OF ESTIMATE AND ASSESSMENT.

See STREETS.

COMMON OF ESTOVERS.

1. Common of estovers cannot be divided or apportioned. The reason is, that it would necessarily lead to surcharging the land from which they are taken. *Livingston v. Ketcham*, 592
2. Where the entire right to common of estovers devolves upon several persons, *by operation of law*, although they cannot enjoy it in severalty, nor either of them alone, *it seems* they may unite, and convey it to one person, who would thereby acquire a vested title. *ib*
3. But when it is once severed, by the act of the party, it is extinguished, and gone forever. *ib*
4. Where land, to which common of estovers is appurtenant, is partitioned by the act of the tenants, without any express stipulation as to the right to estovers, the right is extinguished, as to both tenants. *ib*
5. The separate occupation of distinct portions of such land, by the tenants, for a great number of years, is sufficient to raise the presumption of a division of the land between them, and of an apportionment of the right of common. *ib*

CONDITION PRECEDENT.

1. No party can insist upon a condition precedent when its non-performance has been caused by himself. *The Mayor, &c. of New-York v. Butler*, 325
2. There may be an effectual waiver, by parol, of a condition specified in a written, or even in a sealed, contract. *ib*

CONSTITUTIONAL LAW.

1. The section of the constitution which provides that on the first Monday of July, 1847, jurisdiction of all "suits and proceedings originally commenced and then pending in any court of com-

mon pleas," shall become vested in the supreme court, means all suits originally commenced in the old courts of common pleas, whether the same have proceeded to final judgment, or not; provided any further judicial action is to be had thereon. Accordingly *Held*, that a motion for a special report of a referee, to be made up and incorporated in the record, in a case thus situated, after the first Monday of July, 1847, was properly made in the supreme court. *O'Maley v. Reese*, 643

2. In such a case the supreme court will not grant a mandamus, directed to the referee. *ib*

See EXTRADITION, 6.

CONSUL.

1. The appointment of a person as consul of a foreign power, does not work an abatement of a suit previously commenced against him in a state court. *Koppel v. Heinrichs*, 449
2. The privilege conferred upon the consuls of foreign governments, by the constitution and laws of the United States, of being sued in the federal courts only, does not extend so far as to enable a party, after a suit has been commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting the office of consul of a foreign power. *ib*
3. Jurisdiction of the state courts in suits to which foreign consuls are parties, is excluded only in suits against them. They are at liberty to bring suits against other persons, in the state courts, if they choose to do so. *ib*
4. A party who brings a writ of error to the supreme court, to reverse the judgment of a court below, occupies the position of one voluntarily bringing his suit in the higher court, for redress. And by calling upon the supreme court for its decision upon the merits of the cause, he admits its jurisdiction to make such decision; and he is concluded by that admission. *ib*
5. Where, subsequent to the commencement of a suit against a party, in a state court, he accepted the appointment of consul of a foreign power, by virtue of which he became exempted

from liability to be prosecuted in the state courts, but he proceeded to trial in the suit, upon the merits, without suggesting his privilege to the court, and afterwards brought a writ of error to the supreme court, to reverse the judgment of the court below; *Held*, that he was estopped from setting up his privilege, in bar of the jurisdiction of the state courts. *ib*

CONTEMPT.

- A defendant who is in contempt, is not in a situation to raise the objection that the plaintiff has an adequate remedy at law. *White v. The Springfield Bank*, 225

CORPORATIONS.

1. Corporations have all the powers of ordinary parties, as respects their contracts; except when they are restricted, expressly, or by necessary implication. *Brady v. The Mayor, &c. of Brooklyn*, 584
2. It is not necessary the proceedings of a corporation, at its corporate meetings, should be authenticated by its seal. *ib*
3. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all its contracts, whether sealed or unsealed, written or by parol, are valid. *ib*
4. Where the common council of a city passed a resolution directing a sum which had been reported by arbitrators to be due to a contractor for extra work in grading and paving a street, to be added to the assessment for grading and paving that street; *Held* that such resolution was a substantial acknowledgment, on the part of the corporation, of the extent of the debt, and a promise to pay it. And that after such resolution had been assented to by the contractor, the claim became valid against the corporation to the extent specified therein; and that such resolution could not afterwards be rescinded except by the mutual agreement of the parties. *ib*

See ARBITRATION AND AWARD, 3, 4.
FOREIGN CORPORATIONS.
INSOLVENT CORPORATIONS.

COSTS.

1. *Of a suit for a specific performance.*

1. Costs of a suit, to compel the specific performance of a contract, cannot be allowed to the plaintiff, where no application has been made by him to the defendant, previous to the filing of the bill, to carry the contract into effect, and there has been no refusal or neglect on the part of the latter, to execute the contract; and where the defendant has not been guilty of any improper conduct, and has not improperly resisted the plaintiff's claim to a specific performance. *Swartwout v. Burr*, 495

2. Where a bill for a specific performance of a contract, is filed against the heir of the party who made the contract, and such heir is a lunatic, neither the lunatic, nor his estate, can be charged with the costs of the suit. *ib*

2. *Upon mandamus.*

3. In all cases of suits and proceedings upon writs of mandamus, the granting of costs to the one party or the other is exclusively a matter of discretion with the court; and they may be awarded or refused, as the equity and justice of each particular case may require. *The People v. Densmore*, 557

4. Where a rule for a peremptory mandamus is silent as respects costs, and there is nothing to show that it was the intention of the court to grant costs to the relator, such rule will not be amended so as to provide for the payment of costs. *ib*

3. *In partition suits.*

5. Where a right of dower extends to the whole of the premises sought to be partitioned, the doweress is obliged to contribute to the costs; because they are to be paid from the proceeds of the sale, and the residue is to be distributed. *Tanner v. Niles*, 560

6. Method of apportioning the costs of a partition suit, among the several parties to such suit. *ib*

4. *On motions.*

7. No costs are allowed on motions, unless such motions are necessary, for the attainment of some substantial right in the cause; except they are

awarded by way of punishment. *Jacobs v. Hooker*, 71

COUNSEL.

Power of counsel to bind their clients, by giving information. *Russell v. Lane*, 519

COUNTY COURTS.

The legislature did not intend, by the 55th section of the judiciary act of 1847, to give to the new county courts any judicial power in relation to a judgment in a suit originally commenced in the old court of common pleas. *O'Maley v. Reese*, 643

COVENANTS OF WARRANTY.

A covenant of warranty runs with the land, so long as it remains unbroken. When it is broken by an eviction of the purchaser, or his assignee, a right of action accrues to him to recover the consideration money, and interest. It then takes the character of a chose in action, and can be released by the covenantor, or his assignee. *Cunningham v. Knight*, 399

CREDITOR'S SUIT.

1. *What may be reached by.*

See DEED, 1, 2.

2. *Bill.*

1. The averments, in a creditor's bill, that the defendant has property, &c. to the amount of \$100, and that the bill is not filed by collusion, being required by a rule of the court to be inserted in bills of that nature, the bill would be defective in form without them. But they constitute no part of the plaintiff's case, and it is not necessary for him to prove them. Consequently, the defendant is not bound to answer those averments. *Batterson v. Ferguson*, 490

3. *Answer.*

2. The rule for determining whether an answer to any particular averment in the bill is necessary, is to ascertain

whether it is material to the plaintiff, to enable him to obtain the relief he seeks, to have the proof, or admission, of such averment. If the proof will avail the plaintiff, in obtaining relief, he is entitled to an answer: otherwise the defendant is not bound to answer; for his answer would be immaterial. *ib*

3. Where the bill stated that the defendant had a *considerable* amount of money, or of debts, &c. due to him, and the defendant, in his answer, denied that he had *considerable* money, &c. due to him; but he annexed to his answer a schedule of his property and effects, and stated that it contained a true and full account of all his estate, of every description, goods, chattels, debts and other choses in action; *Held*, that although that part of the answer, taken by itself, might be deemed uncertain and evasive, it was sufficient in connection with the schedule, and the averments in the answer respecting such schedule. *ib*
4. An allegation, in a bill, that the defendant has debts, &c. due to him from different persons whose names are unknown to the plaintiff, is immaterial, so far as relates to the plaintiff's ignorance of the names of the debtors; and the defendant need not answer it. *ib*
5. Where the bill charged that, at the time of the commencement of the suit, the defendant had *some* interest in *some* real estate, &c., and the defendant, in his answer, denied that he had *some* interest in *some* real estate; *Held*, that although the denial was defective in form, the defendant had substantially met the charge. *ib*
6. The fact that property held by a defendant in right of his wife has been delivered over to a receiver appointed in another suit, does not excuse the defendant from giving the best account of such property which he is able to give. *ib*
7. Where the bill states that the defendant has lately recovered a judgment against another person, which belongs to him, it is not sufficient for the defendant to say, in his answer, that all his interest, such as he had, in the verdict, was disposed of and assigned to a third person. The plaintiff has a right to know what the defendant's interest in the verdict was, and when it was assigned, and the particulars in relation to the disposition of his interest. *ib*

4. Receiver.

See RECEIVER, 1.

CRIMINAL CASES.

See DEFAULT, 3.
RECOGNIZANCES.

CUSTOM.

1. An agreement to pay interest on a running account will be implied, when it appears it was the uniform custom of the merchant or manufacturer giving the credit, to charge interest after a certain time, and that such custom was known to the dealer. *Esterly v. Cole*, 235
2. Dealers are not presumed to know such customs: the knowledge must be established either by positive evidence, or by circumstances from which it may be inferred. *ib*

D

DAMAGES.

1. Proceedings to ascertain the damages of the owner of land taken by the United States, under the act of May 5, 1847, (*Laws of 1847*, p. 189,) need not be instituted by, or in the name of, the governor of this state. *United States v. Dumplin Island*, 24
2. It is his duty to apply, as chief magistrate, only when the land of a private citizen is wanted for the use of the state. *ib*
3. The statute which directs that when land is wanted for the use of the United States, and it becomes necessary to issue a writ of inquiry of damages, the like proceedings shall be had as upon applications on behalf of the state, is sufficiently complied with, as respects the manner of commencing the proceedings, if they are instituted in behalf of the United States, by officers authorized to act for the executive, in the premises. *ib*

See MEANS PROFITS, 7.
REFERENCE, 4, 5, 6.

DEBT.

1. The action of debt can in general be maintained for money due on a contract, whenever the demand is capable of being readily reduced to a sum certain, upon the predicated statement of facts. And it is not necessary that every part of the plaintiff's claim should be established on the trial. The plaintiff may, in this form of action, recover less than the sum stated in his declaration to be due. *The Mayor, &c. of New-York v. Butler*, 325

DEBTOR AND CREDITOR.

1. *Assignments for benefit of creditors.*

1. Under the provisions of the statute, unless an assignment made by a debtor for the benefit of his creditors, is accompanied by an immediate delivery of the assigned property, and is followed by an actual and continued change of possession, courts are bound to presume it fraudulent and void as against creditors, and to regard it as conclusively so; unless they are satisfied that it was made in good faith, and without any intent to defraud. *Connak v. Sedgwick*, 210
2. What amounts to a delivery, and an actual and continued change of possession. *ib*
3. Continuing to carry on the business of the assignor, in the same way in which it was conducted prior to the assignment, retailing the goods, replenishing the stock from the proceeds of the sales, and keeping no account of the sales of the assigned property, amounts to a breach of trust, which will authorize the appointment of a receiver. *ib*
4. The insolvency of the assignee is also a good cause for the appointment of a receiver of the assigned property. *ib*
5. The selection of an insolvent person as assignee is a fraud upon the rights of creditors, and evidences an intention on the part of the assignor to delay and hinder them, in the collection of their debts. *ib*
6. An assignee claiming under a general assignment made by a failing debtor, for the benefit of creditors, is only entitled to the same rights and equities

which the debtor would have possessed. *The Marine and Fire Ins. Bank v. Jauncey*, 486

2. *Right of judgment creditors to redeem premises.*

7. The right of a judgment creditor to redeem premises which have been sold upon a prior execution against the property of his debtor, cannot be defeated by the act of the purchaser, in paying the judgment under which the creditor claims to redeem, without his consent; especially where such payment is not made until after the redeeming creditor has actually paid to the sheriff the amount of the purchaser's bid, with interest, and has commenced delivering to the sheriff the papers required by the statute to be presented to, and left with, him. *The People v. Beebe*, 379
8. A stranger to a judgment has no right to pay the same, for the purpose of extinguishing the lien thereof and preventing the holder from redeeming by virtue thereof. *ib*
3. *Proceedings against debtor, under non-imprisonment act.*
9. The act to abolish imprisonment for debt, and to punish fraudulent debtors, has a double aspect; as a civil remedy, and as a criminal proceeding. *Matter of Prime and others*, 296
10. The proceedings under the act are never for the benefit of the creditors at large; except in the single instance of an assignment after the debtor has been convicted of a misdemeanor. *ib*
11. Previous to the execution of the assignment, the proceedings are for the benefit of the prosecuting creditor alone. *ib*
12. The prosecuting creditor is entitled to a preference over the creditors generally, either for himself alone, or for himself and others of a certain class. *ib*
13. It is not necessary that the refusal of the debtor to apply his assets to the payment of the judgment of the prosecuting creditor should be fraudulent, to authorize a warrant of arrest. It is enough that such refusal is illegal, in violation of law, and in contravention of rights acquired by the creditor under the statute. It then becomes unjust, because it is illegal. *ib*

14. And when it is established, by the judgment of a competent tribunal, that the prosecuting creditor has a valid claim against the defendant, and when it is also established as a matter of fact that the debtor has evidences of debt to which, as a matter of law, the creditor has a claim prior, and more potent, than the debtor himself, or any other creditor, it is illegal and unjust for him to attempt to deprive the prosecuting creditor of that right; especially with the object of wresting from him the preference which the law gives him, and conferring it upon others to whom the law does not give it. *ib*

15. That statute, as regards its provisions for compulsory process against debtors by contract, is a mere civil remedy. *Frost v. Myrick*, 362

4. *Right of a creditor to be paid out of a trust fund.*

16. Where a draft was drawn by a consignor of cotton, upon the consignee thereof, on account of such consignment, and was discounted by a bank, upon the faith of representations made by the payee and the drawer that such draft was drawn against the consignment, and would be paid out of the proceeds thereof; which draft was accepted by the drawee, but before the cotton was received by him, he executed a general assignment of his property, for the benefit of his creditors, and his assignee claimed the cotton as a part of the assigned estate; *Held* that the proceeds of the cotton, in the hands of such assignee, was a trust fund, applicable to the payment of the draft drawn against such proceeds. *The Marine and Fire Ins. Bank of Georgia v. Jauncey*, 486

17. Where a principal debtor provides, in the hands of his surety, or of one standing in the situation of a surety, a fund to pay his debt, the creditor is entitled to have such fund applied in payment of that debt. And this even where the creditor had no knowledge of the existence of the fund, when he became such creditor. *ib*

5. *Rights of judgment creditors.*

18. Judgment creditors are entitled only to such rights in the real estate of the debtor as the debtor rightfully possesses. They can take all that belongs to the

debtor, and nothing more. *Talman v. Farley*, 280

See EQUITABLE ASSIGNMENT.

DECLARATION.

See AMENDMENTS, 1, 2.
JUDGMENTS, 13, 14, 15.

DECLARATIONS.

1. *Of parties.* *See* EVIDENCE.

2. *Of a witness.* *See* WITNESS.

3. *Of a former holder of a chose in action.*

1. The declarations of a prior holder of a chose in action, made while he was such holder, are not admissible in evidence against a subsequent purchaser, who has acquired title by paying a valuable consideration. *Smith v. Webb*, 230

2. They are only admissible when made by a party in interest, or by one through whom the plaintiff claims by representation. *ib*

3. The fact that the party who made such declarations has since died, does not render them admissible. *ib*

4. *Of a lender.*

4. Where, immediately after a negotiation for the loan of money, the lender goes into an adjoining room, and, the borrower not being present, states to a third person the terms of the transaction, such declarations constitute no part of the *res gesta*, and are incompetent evidence for the purpose of establishing the defence of usury. *ib*

DECREE.

1. After a final decree has been regularly entered, against a defendant, by default, for want of an answer, the court will not set the same aside, as a matter of course, merely upon the defendant's presenting a sworn answer, setting up a defence to the suit. *Ferussac v. Thorn*, 42

2. The defendant must show that there is a probability that if the decree is

opened he will be able to establish his defence, by proof. And if the court is satisfied, from the answer itself, that it is impossible for the defendant to prove the circumstances relied upon in his defence, by any competent testimony, it will not disturb the decree. *ib*

3. A decree cannot be impeached, after enrolment, except by a bill of review, or a bill in the nature of a bill of review, charging fraud. *Frost v. Myrick*, 362

See Divorce, 13.

DEED.

1. Distinction between an *exception* and a *reservation* in a deed. *Cunningham v. Knight*. 399
2. In 1819, J., being the owner of two lots of land, executed a warranty deed thereof to D. E., which deed was recorded in Nov. 1840. The consideration expressed in this deed was an exchange of lands. D. E. continued to own and possess the lots for about 20 years after the conveyance thereof to him. In 1823, J. executed another warranty deed of the same lots to P. E., the wife of D. E.; which deed was recorded on the 2d of May, 1840. The consideration stated in this deed was an exchange of lands lying in Ohio, being part of the patrimonial estate of the grantee, and \$100. The consent of D. E. to the giving of this conveyance to his wife, and his active agency in effecting it, appeared from the fact that the deed was in his handwriting. The grantor in this deed covenanted to warrant the premises against all persons claiming under, by, or through himself, and against his own acts. On the 22d of May, 1840, D. E. conveyed the same land to his son W. M. E. And on the 9th of Sept. 1840, after the death of P. E., D. E., together with the several children of himself and P. E. his wife, executed to A. S. conveyances of the land, for the sum of \$12,600; \$6,600 of which was paid to the creditors of D. E. and the balance was secured by separate obligations to his children. In 1842, after the death of J., D., the administrator of J., recovered a judgment against D. E.; and an execution having been issued upon that judgment, and returned unsatisfied, D. filed a creditor's bill against D. E., the judgment debtor, A. S., the purchaser of the land, and the children of D. E., charging therein that the deed executed by J. to P. E. conveyed no title to her, inasmuch as the same land had been previously conveyed to D. E., and was then held by him, under his deed, and praying that the land, in the hands of A. S. might be appropriated to the payment of the plaintiff's judgment; or that the amount of the notes given by A. S. to the children of D. E., for the purchase money, might be appropriated to that purpose, and especially, that the part remaining unpaid of one of the notes given to a daughter of D. E., who died before the whole was paid, might be so applied: *Held*, (1.) That it was competent for J., the grantor, by the agreement and consent of D. E., to convey the same land to a third person, for a valuable consideration, which he had previously conveyed to D. E.
- (2.) That D. E. consenting to, and aiding in, such new conveyance, would be estopped, in equity, from setting up his prior legal title against the defective title of the second grantee.
- (3.) That the fair presumption was, that it was agreed between D. E. and J., that the lots should be deemed to be restored to J., and that the same should be conveyed to P. E.
- (4.) That upon the same principle on which a court of equity would interfere to prevent D. E. from asserting his legal title, against a third person who had been induced by him to part with his money for the estate, it would protect the title of P. E., in her heirs, against her husband, and those claiming under him, if in truth her property formed the consideration of the conveyance to her, even if she had notice of her husband's prior deed.
- (5.) That P. E. was to be regarded as a bona fide purchaser without notice.
- (6.) That if A. S. purchased the premises, relying on the truth of the recital in the deed to P. E., that the latter had advanced the consideration out of her own property, the grantor would be estopped from denying it; upon the well settled principle relating to an estoppel *in pais*.
- (7.) That J., and the plaintiff as his administrator, were estopped from alleging that the deed to P. E. conveyed no title to her, and from setting up a title as

against her, derived under the prior deed to P. E.

(8.) That the case came within the general rule, that an executor or administrator can only maintain such claim as the testator or intestate might have successfully adopted while living.

(9.) That it must be assumed, as between the parties to the suit, that when A. S. purchased the farm, it was owned by the children and heirs of P. E., subject to the life estate of D. E. therein, as tenant by the curtesy.

(10.) That the plaintiff could not reach the land in the hands of A. S., by his creditor's bill, and have it appropriated to the payment of his judgment; nor the amount remaining unpaid upon the note held by the deceased daughter of D. E., at the time of her death. *Dennison v. Ely*, 610

3. Where a deed conveyed to the grantee the land therein described, in fee, together with all the estate, right, title, interest, claim and demand whatever of the grantor, either in law or equity of, in, and to the premises; *Held* that it was the intention of the grantor to convey the land, and that this clause was not to be regarded as a mere release or quit-claim, or as inserted with any purpose to limit the grant, but as used for greater caution, to embrace any claim or title, equitable as well as legal, which the grantor might have in the land. *ib*

4. The *habendum* clause, in a deed, may enlarge, abridge, or explain the premises. *ib*

5. The cancellation, or re-delivery, of a deed, with the view of re-investing the grantor with the title, will not have that effect. *ib*

6. The principle upon which a court of equity grants relief against conveyances obtained by fraud, or undue influence, is applicable to all cases where the relation between the parties gives one a controlling influence over the other. *Segre v. Shafer*, 408

7. The fact of a deed having been prepared at the sole instance of the grantee, and not shown to the grantor, or mentioned to him, until the same was presented for execution, is a suspicious circumstance, and raises a presumption of fraud. But it is not decisive, and

may be rebutted by proof that there has been no abuse of confidence by the grantee. *ib*

See Escrow.

DEFAULT.

1. After a default has been regularly taken against a defendant, the same will not be opened, upon a mere general affidavit of merits. The party must disclose the nature of his defence; so that the court may judge whether it is meritorious. *McGaffigan v. Jenkins*, 31

2. If the plaintiff amends his bill, by adding new parties, after the defendant's default for want of an appearance has been entered, he thereby waives the default. *Scudder v. Voorhis*, 55

3. A judgment against the defendant in a criminal case, will not be reversed by default. The court must be satisfied that there was error in the record, or proceedings, of the court below. *Beron v. The People*, 136

DEFENCE.

A defendant, after virtually trying one defence and failing in it, will not be allowed to withdraw the same, and set up one entirely different. *Willet v. Fayerweather*, 72

DEMAND.

See Bills of Exchange, 5, 6, 7.

DEMURRER.

See Pleading, 17, 18.

DEPOSITIONS.

See Practice, 17, 18.

DESERTERS.

See Extradition, 1, 2, 3.

DEVISEES.*See* **HEIRS.****DILIGENCE.***See* **PARTNERSHIP.****DISCONTINUANCE.***See* **JUDGMENTS**, 13, 14, 15.**DISCOVERY.***See* **BILL OF DISCOVERY.****DISTRESS.**

As a general rule, it seems, that previous to the passage of the act to abolish distress for rent, where a tenant died leaving rent in arrear, the landlord could distrain for rent, after administration granted. But if the landlord was also the administrator of the deceased tenant, he could not distrain. For a landlord, by accepting the office of administrator of his tenant, waives his right to distrain. *Hovey v. Smith*, 372

DIVORCE.1. *What is a bar to a suit for.*

1. By the law, as it stood previous to the revised statutes, both a condonation of the defendant's offence, and acts of adultery on the part of the complainant, operated as a bar to a suit for a divorce. *Morrell v. Morrell*, 318
2. But it seems the same effect was not given to a condonation of an act of adultery, set up by way of recrimination, as when set up on the part of the complainant. *ib*
3. The law respecting divorces being now regulated by statute, a condoned adultery of the complainant is not a defence to a suit for a divorce, unless made so by the statute. *ib*
4. And under the provisions of the revised statutes, as a condoned adultery of the

defendant will not entitle the complainant to a divorce, so a condoned act of adultery on the part of the complainant will not bar his suit for a divorce. *ib*

2. *Issues at law.*

5. The complainant in a suit for a divorce has a right to go into proof to show under what circumstances he has been guilty of the adultery which is set up as a bar to his suit; and to have the issues framed accordingly. *ib*
6. Where the defendant, in a suit for a divorce on the ground of adultery, sets up in her answer acts of adultery on the part of the complainant, as a bar to the suit, and the complainant files a replication to such answer, he thereby takes issue not only upon the recriminating charges contained in the answer, but he makes another issue, viz. that the adultery charged against him was not committed under such circumstances as would have entitled the defendant, if innocent, to a divorce. *ib*
7. And in such a case, the court is bound to frame an issue not only upon the charge of the complainant's adultery, but also upon the circumstances under which he was guilty, if required by him to do so; provided the circumstances alleged in the proposed issue are such as, under the provisions of the revised statutes, will be a bar to the defendant's charge. *ib*
8. Upon a reference to a master to settle issues, in a case thus situated, it is the duty of the master to decide, as a question of law, what circumstances, under the statute, will be a defence to the charge against the complainant, and to frame an issue accordingly. *ib*
9. Where a denial of the adultery charged in the bill, and a condonation, are set up in the answer, they are the subject of separate issues. *ib*
10. Where the defendant, in a suit for a divorce, sets up the adultery of the complainant, as a bar, she must state the name of the person with whom the adultery was committed, if the person is known. If the person is unknown, that fact should be stated in the answer, and in the issue. *ib*
11. There must also be reasonable certainty as to time and place. *ib*

12. What is a reasonable certainty. *ib*

3. Decree on bill taken as confessed.

13. The court will not grant a decree for divorce, upon a bill taken as confessed by the defendant, until after an inspection of the bill, proofs, and the affidavit of service of the subpoena upon the defendant. *Robinson v. Robinson*, 27

DOWER.

1. An infant *feme covert* cannot bind herself by deed, so as to bar her right of dower. *Cunningham v. Knight*, 399
2. Where the husband has only an instantaneous seisin of land—as where he takes a conveyance thereof and gives back a mortgage for the purchase money—the wife is not entitled to dower therein. *ib*
3. The section of the revised statutes declaring that, where lands are mortgaged by the husband previous to his marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged, as against every person except the mortgagee and those claiming under him, is not applicable to the case of a mortgage for the purchase money. *ib*
4. A widow is not entitled to dower in a vested remainder in fee belonging to her husband, limited on a precedent estate for life. *Green v. Putnam*, 500
5. A right of dower, before assignment, is a right resting in action only. The widow may release it, but she cannot convey or assign it. *ib*
6. A widow, until the assignment of her dower, has no estate in the land, out of which such dower arises. *ib*

E

EJECTMENT.

1. The action of ejectment, as now used, is created by statute, and is to have the effect which is declared by statute, and no other. *Ainslie v. The Mayor, &c. of New-York*, 168
2. Formerly, the action of ejectment was a mere possessory action, and conclu-

ded no one, either as to the title, or the possession, except as to the time between the day of the demise and the recovery. Even the party against whom the judgment was rendered was at liberty to bring a new action, and again litigate as to the possession, as often as he pleased. *ib*

3. But by the revised statutes, a judgment in an action of ejectment, unless a new trial be granted, concludes the parties to the action, and all persons claiming under them by a title accruing after the commencement of the suit. *ib*

See MERNE PROFITS.

ELECTION.

See PLEADING, 5, 6, 7.

EQUITABLE ASSIGNMENT.

1. No particular form of words is necessary, to constitute an equitable assignment of a fund. But there must, at least, be evidence of an intention to appropriate the fund. *Dickenson v. Phillips*, 454
2. P. being indebted to D. gave him security for the payment of the debt, upon a schooner belonging to him; agreeing, at the same time, that he would procure an insurance upon the vessel, and transmit the policy to the creditor. He subsequently caused the schooner to be insured in the name of G., a third person, and wrote to D. informing him thereof, and stating that G. was to hold the amount of the insurance subject to the order of D. in case of loss; and assuring D. that his interest would at all times be kept covered by insurance. The debtor also told another person that he had directed G. to pay the proceeds of the policy to D., but there was no evidence that he had done so; *Held* that these representations and assurances merely showed an intention on the part of P. to appropriate the avails of the insurance to D.'s benefit; and that they did not amount to an equitable assignment to D. of P.'s interest in the proceeds of the policy, so as to give D. a specific lien thereon. *ib*
3. The distinction between those cases in which the transaction has been held to constitute an equitable assignment

of a fund, and those in which it has been held not to constitute such an assignment, depends upon the question whether the party having the control of the fund intended, in fact, to make an absolute appropriation of it, or whether he intended himself to retain the control of it; *it seems.* *ib*

4. In order to constitute a specific appropriation of a particular fund to the payment of a specific debt, an intention to surrender to the creditor all control over the fund, is necessary. *ib*
5. Where a debtor gives to his creditor an order upon one indebted to him, requesting him to pay to the creditor the amount of his debt, such order will be construed as an equitable assignment of the debt; even though the drawee had never assented thereto. *ib*

ERROR.

1. A writ of error is a statutory remedy, and must be strictly pursued; and a party seeking the benefit of the writ must bring himself, and his case, within the statute. *Overseers of the Poor of Clayton v. Beedle*, 11
2. A writ of error cannot be brought upon a judgment in a personal action, by any person other than the party against whom the judgment was recovered; or, in case of his death, by his personal representatives. *ib*
3. There is no privity between overseers of the poor who have brought a suit in their official character, and their successors in office, which will enable the latter to bring a writ of error upon the judgment recovered in that suit. *ib*
4. Nor can such successors be substituted as plaintiffs in a writ of error pending at the time of their election, or afterwards brought, in the names of the previous overseers, to reverse a judgment recovered against them. *ib*
5. A writ of error is not a *suit*, or *action*, within the meaning of the section of the statute which provides that no suit commenced by or against certain public officers shall be abated or discontinued by the death of such officers, or their removal or resignation, or the expiration of their term of office, but that the court in which the action is pending shall substitute the names of the successors in such office. *ib*

6. If the record upon which a writ of error is brought has not been properly made up, the proper course is to apply to the court in which the judgment was rendered, to amend the record. With such errors the appellate court has nothing to do. *Luysten v. Sniffen*, 428
7. Upon a writ of error, the appellate court will assume that the court below has made up the record of its judgment correctly; or, if such record is amended, that the amendment was properly made. *ib*
8. It is the province of the supreme court to examine, and correct, all errors which shall be found in any record brought there by writ of error; but it has no control over errors which have occurred in making up such record. *ib*

See AMENDMENTS, 6, 7.
CONSUL, 4, 5.

ESCROW.

If a deed is delivered as an escrow, it does not take effect until the condition is performed and the deed is delivered over to the grantee; and in the mean time the estate does not pass, but remains in the grantor. *Green v. Putnam*, 500

ESTOPPEL.

1. How far recitals in a deed operate by way of estoppel. *Dennison v. Ely*, 610
2. *It seems* that the grantor in a deed is estopped, by a recital therein of a specific consideration moving directly from the grantee, from denying that fact. But if such a recital does not estop the grantor, as to the fact recited, the evidence to controvert it should be of such a character as clearly to disprove it. *ib*

See CONSUL, 4, 5
DEED, 2.

EVIDENCE.

1. *Distinction between prima facie, and conclusive.*
1. The only difference between *prima facie*, and *conclusive*, evidence is, that

the former may, and the latter cannot, be contradicted. *Ainslie v. The Mayor, &c. of New-York*, 168

2. *Parol evidence to explain written instruments.*

2. It is a general rule that where the terms of a written instrument denoting the subject matter are equivocal, parol evidence may be admitted, to apply them to a particular subject matter. *The Mayor, &c. of New-York v. Butler*, 325

3. Where an award is indefinite as to the subjects investigated and determined, parol evidence is admissible to show that the arbitrator has exceeded his authority, and that therefore his award is null and void. *ib*

3. *Testimony of wife against her husband.*

See HUSBAND AND WIFE, 6, 7, 8.

4. *Effect of receiving improper evidence.*

4. Where, on the trial of a cause, improper evidence was received, yet if it appears to the court that such evidence could not have materially influenced the jury in arriving at their verdict, a new trial will not be granted for that cause. *Smith v. Kerr*, 155

5. *Judgment record.*

See MEANS PROFITS, 4, 5.

6. *Declarations of parties.*

5. The declarations of a defendant in a slander suit, made during an attempt to arbitrate, that he had satisfied the plaintiff by writing to his brother, and exculpating the plaintiff, are not admissible in evidence in favor of the defendant; although such declarations tend to prove one branch of the defence, viz. accord and satisfaction. *ib*

7. *Affidavits.*

6. On an application to confirm the report of commissioners of estimate and assessment, affidavits made by persons who are only interested in the question, and not in the result of the proceedings before the court, may be read, in opposition to the motion. *In the matter of Flatbush Avenue*, 286

8. *Belief.*

7. The mere unsupported belief of a witness is not evidence. Belief, to be admissible, must rest upon sufficient

and legal foundation. No belief, however confident, will suffice, without recollection. *Butler v. Benson*, 536

9. *Opinions of witnesses.*

8. The opinions of witnesses, as to the mental capacity of a grantor in a conveyance, or as to his being subject to the control of others, are inadmissible as evidence. *Sears v. Shafer*, 408

9. The only legal testimony on such subjects—except in cases of witnesses to a will, or on questions of science—consists of the acts and declarations of the parties evincing a want of capacity or subjection to influence. *ib*

10. It is for the court, and not the witness, to form an opinion from the facts. *ib*

EXECUTION.

1. Growing trees, fruit, and grass, being parcel of the land, are within the statute of frauds; and until severed from the land, either actually or in contemplation of law, they cannot be conveyed, or contracted to be conveyed, by parol, nor taken in execution as chattels. *The Bank of Lansingburgh v. Crary*, 542

2. The defendant in an execution cannot, by parol, authorize the levy of an execution upon growing trees, fruit or grass growing on his land, before severance. And if he, by parol, turns out such growing trees, fruit or grass to the sheriff, on the execution, and the sheriff, by virtue of such authority, levies on the same, the levy will be void. *ib*

3. If a sheriff, after making a levy on an execution in his hands, receives other executions against the same defendant, the receiving of such executions operates as a constructive levy under them on the property levied upon under the first execution. *ib*

EXECUTORS AND ADMINISTRATORS.

1. Letters testamentary issued in the sustained state of Connecticut will not a suit brought by executors in the courts of this state. *Smith v. Webb*, 230

2. But when the plaintiffs, though executors appointed in a foreign state, are also the owners of the bond and mortgage on which the bill is filed, as residuary legatees and by purchase of the interest of their co-legatee, the title having thus passed by delivery, though without any written assignment, they may sue in the courts of this state. *ib*
3. A creditor, on presenting a claim against an estate, to administrators, under 2 R. S. 88, § 35, is not bound to exhibit the evidence of his claim, or make oath of the justice thereof, unless required to do so by the administrators. *Russell v. Lane*, 519
4. The fact that a claim was presented to administrators previous to the publication of notice to creditors, does not render the presentation invalid. A creditor has a right to present his claim to the representatives of the deceased at any time; and is not confined to the six months succeeding the first publication of the notice. *ib*
5. The section of the revised statutes which provides that if an executor or administrator doubts the justice of any claim so presented he may enter into an agreement in writing to refer the same, extends to all claims presented to the executor or administrator, and is not confined to those only which are specified in that section. *ib*
6. An executor or administrator may consent to refer a claim presented to him, notwithstanding he has not required vouchers, or an affidavit of the justice of such claim. *ib*
- serter from a foreign vessel, must show that the person proceeded against deserted from the vessel while in a port of the United States. *ib*
3. Unless that fact appears, the officer to whom application is made will not obtain jurisdiction to act upon the complaint. *ib*
4. The president of the United States has no authority, by virtue of mere treaty stipulation, and without an express enactment of the national legislature, to deliver up a resident of this country to a foreign power. *In the matter of Metzger*, 248
5. Upon the principles of the common law, a treaty does not execute itself; nor can the courts act under it, for the purpose of enforcing its provisions, except in pursuance of a statute. *ib*
6. The provision in the constitution of the United States which declares that the constitution, and the laws made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, does not, *ex proprio vigore*, and without legislative enactment, confer upon the officers of the national government the power of executing the stipulations of a treaty. *ib*
7. Where a treaty contains a provision importing a contract that its terms shall, at some future period, be ratified and confirmed, such treaty does not execute itself; but it must be executed by an act of congress, before it can become a rule for the decision of the courts. *ib*
8. Where the treaty is a contract to be performed *in futuro*, the courts have no power, except under the statute; and if the provisions of the statute are not clearly complied with, they have no power at all, in the matter. *ib*
9. The treaty of 1843, between the United States and France, cannot, in any sense, be held to execute itself. It was not intended to act *in presenti*. It was a contract between the two nations to be executed only *in futuro*; and it stipulated for future legislation. Without such legislation the courts have no power to act, in executing the treaty. *ib*

EXTRADITION.

1. The act of congress entitled "An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States," passed March 2d, 1829, confers no power upon any but courts and officers of the United States. And no court, judge, justice, or other magistrate of this state, can lawfully assume to execute its requirements. *In the matter of Bruni*, 187
2. The proceedings, upon an application under that act, against an alleged de-

10. Although that treaty may be regarded as executing itself, so far as to establish the right of the French government to the surrender of a criminal, legislation is required to enforce the delivery, and secure the subsequent possession, of the fugitive. *ib*
11. And the want of such legislative sanction is not mere matter of form. It is a substantial right; and involves too deeply the liberty of the citizen, to be dispensed with. *ib*
12. In cases of this nature state magistrates have no original authority. *ib*
13. Nor has a district judge of the United States, at chambers, any power to aid in carrying a treaty into effect; in the absence of any provision of the constitution, of the treaty, or of the statute, conferring the power upon officers of that description. *ib*
14. The mandate of the president of the United States commanding the marshal to surrender a prisoner to the diplomatic agents of a foreign government, under the provisions of a treaty, is not conclusive. Upon a writ of *habeas corpus*, the legality of the foundation on which such mandate rests may be inquired into. *ib*
15. Where a treaty was drawn up in the French as well as in the English language, and both parts were originals, and were intended by the parties to be identical, but the French counterpart varied from the English in certain particulars; *Held*, that if both parts could without violence be made to agree, that construction ought to prevail which would establish a conformity between the two parts. *ib*
16. A prisoner who has been merely charged, or accused, before a magistrate in France authorized to arrest, is not a party accused—*mis en accusation*—within the meaning of the treaty of 1843 between the United States and France. And he cannot be demanded by the French government, nor surrendered by the American, by the terms of that treaty. *ib*
17. The president cannot execute the power of extradition, under that treaty, without both legislative and judicial sanction, previously obtained. *ib*

F

FIXTURES.

1. What articles of property are to be considered fixtures. *Hovey v. Smith*, 372
2. A pump and pipe, balances and scales, and a beer pump are *prima facie* personal property, and can only descend to the heir in consequence of being annexed to the freehold in such a manner, and under such circumstances, as to come within the seventh section of the article of the revised statutes relative to the duties of executors, &c. in taking and returning inventories. *ib*

FORECLOSURE SUITS.

1. A decree of a court of equity for the foreclosure of a mortgage, extinguishes the lien of the mortgage; although such decree is merely enrolled, and not docketed. *The People v. Beebe*, 379
2. Where mortgaged premises are sold under a prior mortgage, and there is a surplus arising from the sale, which is brought into court, such surplus belongs to the mortgagees in a second mortgage, having a superior equity, rather than to judgment creditors of the mortgagor; although their judgments are prior in date to the second mortgage. *Tallman v. Farley*, 280
3. Where the assignee of a decree in a foreclosure suit is unconscientiously enforcing the same, against the mortgagor, for the deficiency, in violation of an agreement made by the assignor not to do so, a court of equity has power to interfere, for the protection of the mortgagor. And the mortgagor is not bound to wait until the deficiency is wrung from him, by execution upon the decree, or by proceedings under the Stilwell act, before he can ask for that protection. *Frost v. Myrick*, 363

FOREIGN CORPORATIONS.

Where a foreign corporation appears in court, it must establish its right to bring the suit, and to make the contract it seeks to enforce. But it is sufficient if this is shown upon the hearing of the cause. It is not necessary to set forth, in the pleadings, the authority upon which it relies to sustain its

right to sue or enforce the contract.
The Marine & Fire Insurance Bank
of Georgia v. Jauncey, 486

FORFEITURE.

See ONONDAGA SALT LOTS.

FRANCHISE.

See STREETS, 10, 11.

FRAUD.

1. If a party makes a false representation to another person who is about to act upon the faith of that representation, the former must make the representation good, if he knows it to be false.
Willink v. Vanderveer, 599

2. Where a party, intentionally, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud, in the truest sense of the term. *ib*

FRAUDULENT CONVEYANCES.

See DEED, 6, 7.

FRAUDULENT DEBTORS.

See DEBTOR AND CREDITOR, 1, 2, 3.

FRUIT.

See GROWING TREES.

G

GIFT.

1. Where a person interested in remainder in real estate devised to others for life, voluntarily, and as a free gift, conveys her interest to the tenants for life, from a sense of justice, and to carry into effect the supposed intentions of the

testator, such conveyance is valid, if executed by the grantor freely and understandingly, with a full knowledge of her rights and interests, and of the consequences of her act. *Sears v. Shafer,* 408

2. Where a gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of an easy temper and yielding disposition, liable to be imposed upon, a court of equity will look upon such a gift with a very jealous eye, and will very strictly examine the conduct and behavior of the person in whose favor it is made. If it can discover that any acts, or stratagems, or any undue means, have been used by him to procure such gift; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give the latter an undue influence over the former; if there be the least *sciintilla* of fraud, the court will interpose. *ib*

GRASS.

See GROWING TREES.

GROWING TREES.

1. Growing trees or grass may be severed, in law, from the land, and become personal property without any actual severance; as where the owner in fee of the land, by a valid conveyance in writing, sells the trees or grass to a third person; or where he sells the land, reserving the trees or grass. *The Bank of Lansburgh v. Crary,* 542

2. A mortgage of growing trees or grass, given by the owner in fee of the land of which they are parcel, does not work a severance in law of the trees or grass from the land, until the mortgage becomes absolute by the non-performance of the conditions of the mortgage. *ib*

H

HABEAS CORPUS.

1. Upon a writ of *habeas corpus* the court cannot look beyond the colorable authority of the judge who issued the

warrant on which the defendant was imprisoned. It cannot inquire into the technicalities, nor the strict regularity, of the proceedings before that officer. *In the matter of Prime and others*, 340

2. The writ of *habeas corpus* is not intended to review the regularity of the proceedings, in any case, but rather to restore to his liberty the citizen, who is imprisoned without color of law. *ib*
3. Upon a writ of *habeas corpus* the court will merely look into the sheriff's return containing the warrant by virtue of which he detains the relator, and into the affidavits upon which the warrant was issued, so far as to see that the officer issuing the warrant had colorable jurisdiction. *ib*
4. And if the court finds that the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question; nor undertake to say whether he erred in adjudging the proof to be sufficient. *ib*
5. If the court finds that the warrant under which the relator is imprisoned is prima facie sufficient to justify the imprisonment, and if, on looking beyond the warrant, and examining the affidavit upon which the same was issued, it is satisfied that there was at least colorable proof before the officer issuing the warrant, on which he might exercise his judgment in awarding the process, that is as far as the court will go, upon a writ of *habeas corpus*. And where these facts appear, it will not discharge the person imprisoned. *ib*
6. The general provisions of the *habeas corpus* act show that it was not intended as a writ of review, to correct the errors of inferior tribunals. *ib*
7. It seems that nothing is properly before the court, upon the return of a *habeas corpus*, except the warrant on which the relator is imprisoned. If that is regular on its face, and if the sheriff would be protected in an action of trespass, it is sufficient; and the relator cannot be discharged. *Per HURLBUT, J.* *ib*

See EXTRADITION, 13.

HEIRS.

1. The heirs or devisees may sell and convey the real estate of which the testator or intestate died seised, at any time after his death. But if they convey previous to the expiration of three years, the lands pass subject to the power of the surrogate to direct the same to be sold for the payment of debts. *Hyde v. Tanner*, 75
2. And in case the exercise of that power becomes necessary, by reason of a want of personal assets, the title made under the surrogate's sale will be paramount to all titles made by or through the heirs or devisees; and will convey the estate precisely as it was left by the decedent. *ib*

HUSBAND AND WIFE.

1. *The wife's choses in action.*

1. Where a husband pledges, as security for a temporary loan, a note given to his wife before marriage, and afterwards redeems the note and receives it back, this is not such a reduction of the same into his possession as will destroy the wife's interest in it, or authorize the husband to sue thereon in his own name only. *Latourette v. Williams*, 9
2. A *chose in action* belonging to the wife will not be considered as reduced by the husband into his possession, merely by his having the actual possession of the instrument. *ib*
3. It is necessary that the money should be actually received by him, or by a third person as his agent, for his use; or that a judgment should be recovered, and an execution issued, in the name of the husband and wife, or in the name of the husband alone. *ib*
4. The wife's title by survivorship, to her *chose in action*, can only be barred by a release of the demand by the husband, or by a sale of it, either absolute or conditional. *ib*

2. *Suits for a separation.*

See ALIMONY.

3. *Incapacities of wife.*

5. An infant *feme covert* cannot bind

herself by deed, so as to bar her right of dower. *Cunningham v. Knight*, 399

4. *Testimony of wife against her husband.*

6. The testimony of the wife can never be received against her husband, except in proceedings instituted against him on her behalf. *Barnes v. Camack*, 392

7. This rule holds not only during the coverture, but also continues to apply after a dissolution of the marriage contract, as regards transactions which took place previous to such dissolution. *ib*

8. The only safe and correct practice is, to adhere to the rule that whatever passes between the husband and wife, in confidence, shall forever remain sacred. *ib*

I

IDIOTS AND LUNATICS.

1. The reason of the greater strictness which prevails in the English court of chancery in relation to the form of the inquisition upon a commission in the nature of a writ *de lunatico inquirendo*, has no connection, it seems, with the question of jurisdiction. But it is to be found in the fact that by the English statutes, the party who, by an inquisition, has been found to be a lunatic, or person of unsound mind, has a right to traverse the finding of the jury. *In the matter of Mason*, 436

2. Here, the right to traverse the inquisition does not exist; and therefore there is not the same reason for insisting upon a particular form in the finding of the jury. *ib*

3. By the statute of this state, the care and custody of the persons and estates of lunatics, idiots, &c. is confided to the court of chancery, without any restriction or limitation. The manner in which the control thus given is to be exercised, is entirely a matter of discretion. The form of the return to the inquisition is only important so far as it is necessary to satisfy the conscience of the court. *ib*

4. If enough appears upon the inquisition to enable the court to adjudge the party to be within some one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient. *ib*

5. It is enough to give the court jurisdiction if the jury find that the party is mentally incapable of governing himself, or managing his affairs. *ib*

6. Yet it seems it is better to adhere to the technical form of finding in the language of the statute itself. *ib*

See *COSTS*, 2.

INCUMBRANCES.

A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice. *Barnes v. Camack*, 392

INFANT.

See *HUSBAND AND WIFE*, 5.

INJUNCTION.

I. IN WHAT CASES GRANTED

1. *To prevent the execution of a power.*

1. A court of equity will not interfere, by injunction, to prevent the execution of a power imposing a duty the performance of which it is the province of the court to enforce; unless the power has been inequitably or unconscionably executed. *Selden v. Vermilyea*, 58

2. *On a second bill.*

2. After the court of chancery has dissolved an injunction issued upon a bill filed in that court, it is irregular for the plaintiff to dismiss his bill, and on a new bill, substantially the same as the former, filed in this court, apply to a judge thereof, at chambers, for a new injunction. *Harrington v. The American Life Ins. and Trust Co.* 244

3. If there are grounds to justify the issuing of a new injunction upon the second bill, in such a case, the plaintiff should apply to this court for a temporary injunction, and for an order that

the defendant show cause why it should not be continued till the hearing. *ib*

3. To prevent a breach of an agreement.

4. A court of equity will not restrain, by injunction, the breach of an agreement that the defendant will not make engagements with other persons than the plaintiff to sing in concerts, operas, &c. *Sanquirico v. Benedetti*, 315

4. Where bill shows an adequate remedy at law.

5. If, from the matter of a bill itself, it appears that the plaintiff has an adequate remedy at law, an injunction cannot be sustained on such bill. *Mallett v. The Weybossett Bank*, 217

5. To restrain proceedings under the *Stilwell act*.

6. A court of equity has jurisdiction to restrain a party, by injunction, from proceeding against the person, and the equitable interests, of his debtor, under the third and subsequent sections of the act to abolish imprisonment for debt and to punish fraudulent debtors, in cases proper for the interference of such court. *Frost v. Myrick*, 362

6. To restrain a party from proceeding under the insolvent act.

7. An injunction will not be granted to restrain a defendant in a creditor's suit from proceeding under the insolvent act, to obtain his discharge; unless special cause is shown for restraining him. *Schanck v. Sniffen*, 32

II. ALLOWANCE OF.

8. Where an injunction has been allowed by an officer competent to act in either of two characters, and where it does not appear clearly in which character he did act, it will be presumed he acted in the higher office of judge of the court, instead of that of injunction master. *Frost v. Myrick*, 362

III. BOND.

9. It is irregular for the plaintiff to file an injunction bond, unless its execution has been duly proved or acknowledged. *Harrington v. The American Life Ins. & Trust Co.* 244

IV. DISSOLUTION OF.

10. The rule that where there are several

defendants who are implicated in the same transaction the answers of all must be perfected, before either of them can move to dissolve an injunction, is not inflexible; but has its limitations and qualifications. One important one is that the plaintiff must have taken the requisite steps to compel an answer from all the defendants. *Mallett v. The Weybossett Bank*, 217

11. So where the defendants on whom the real gravamen rests have fully answered, they may apply to have an injunction dissolved, as to them, although a co-defendant has not put in his answer; especially if he is a non-resident and cannot be compelled to answer. *ib*

12. Another important qualification of the rule is that it is applicable only to an injunction properly granted. *ib*

13. A defendant cannot move to dissolve an injunction on account of want of due diligence on the part of the plaintiff in prosecuting the suit, except in cases where the defendant cannot himself expedite the cause. Where the situation of the cause is such, that the defendant may proceed therein without waiting for the plaintiff, the plaintiff's inactivity is no cause for dissolving the injunction. *Schermerhorn v. Merrill*, 511

14. An injunction, properly allowed in the first instance, will not be dissolved on the coming in of the answer, in the absence of any laches on the part of the plaintiff, unless the defendants, in their answer, have positively denied all the equity of the bill under oath. *ib*

15. And where the bill charges fraud, it is not sufficient that some of the defendants have denied all fraud as to themselves, if their title or rights may be affected by the fraud charged against the other defendants. If the act charged as fraudulent forms one link in their title, and is charged to have been done by another, through whom they hold, and under circumstances which preclude them from the benefit of the position of bona fide holders without notice, it is not sufficient that they deny all fraud on their part. *ib*

16. But where the answer of a defendant answering under oath, from his own knowledge, denies the whole equity of the bill, and makes a clear title in himself, in such a way that it cannot, if

the answer be true, be effected by the fraud charged in the bill and not denied, his case is severed from that of his co-defendants, and stands upon its own merits. *ib*

17. Where the plaintiff waives an answer on oath from all the defendants, and one of them answers on oath, denying the whole equity of the bill, he may move to dissolve the injunction, upon his answer, notwithstanding his co-defendant has put in an answer without oath. *ib*

V. DAMAGES UPON.

See REFERENCE, 4, 5.

INQUISITION.

1. The inquisition taken under a writ *ad quod damnum* should find who is the owner of the land taken, the amount of the damages, and to whom the same are to be paid. It should also provide for the payment of the owner's costs and expenses. *The United States v. Duplein Island*, 24
2. Officers before whom an assessment of the damages sustained by the opening of a street in a village is had, and whose duty it is to deliver the inquisition of the jury to the trustees of the village, cannot escape from the performance of that duty, by voluntarily parting with the control over the inquisition. *In the matter of the Trustees of Williamsburgh*, 34

See IDIOTS AND LUNATICS.

INSOLVENT ACT.

See INJUNCTION, 7.

INSOLVENT CORPORATIONS.

1. Where an application is made to an officer, by a receiver of an insolvent corporation, for a warrant to bring a debtor before such officer for examination, pursuant to the statute, (2 R. S. 464, § 42; *Id.* 469, §§ 67, 68, 72; *Id.* 43, § 12,) the petition for that purpose should state the facts upon which the application is founded, positively, and not in the alternative. *Halliday v. Noble*, 137

2. If the petition states that the person proceeded against has in his possession, either individually or as administrator, &c., some property belonging to the petitioner; that such person, for the estate of his intestate, is indebted to the petitioner; and that he, either individually or as such administrator, has in his hands a large amount of money, belonging to the petitioner; which he has not accounted for or delivered over to him; such petition will be defective, and will not authorize the issuing of a warrant. *ib*

3. If the person against whom an application of this nature is made, is indebted only as an administrator, he is not a person liable to be proceeded against, under the statute. *ib*

INTEREST.

Interest is not recoverable on a running or unliquidated account, unless there is an agreement, either express or implied, to pay interest. *Esterly v. Cole*, 235

See CUSTOM.
USURY.

INTERROGATORIES.

See COMMISSION OF REBELLION.

INVESTMENTS.

See MONIES IN COURT.

J

JUDGE'S CHARGE.

Where it appears that the charge of a judge on the trial of a cause, though erroneous, could not have materially influenced the jury, in arriving at their verdict, a new trial will not be granted, for that cause. *Smith v. Kerr*, 155

JUDGMENTS.

1. *Within what time to be entered, on cognovit.*
1. Where more than two terms have elapsed since the giving of a cognovit

by the defendant, and the plaintiff has died in the meantime, the court has no power to allow a judgment to be entered thereon. *Lewis v. Rapelyea*, 29

2. Docketing.

2. The practice of docketing judgments before the records have been signed by the clerk, is erroneous, and will not be sanctioned by the court. *Williams v. Wheeler*, 48

See AMENDMENTS, 6 to 9.

3. Who concluded by.

3. By the revised statutes, a judgment, in an action of ejectment, unless a new trial be granted, concludes the parties to the action, and all persons claiming under them by a title accruing after the commencement of the suit. *Ainslie v. The Mayor, &c. of New-York*, 168

4. Given to secure a partnership debt.

4. A judgment recovered upon a warrant of attorney given to an individual member of a partnership firm, will, if given to secure a debt due to the firm, belong to the firm; and the person to whom such warrant is given will hold the judgment as trustee for the copartnership. *Chapin v. Clemitson*, 311

5. A satisfaction of such a judgment will amount to a satisfaction of the copartnership debt; and will be a complete discharge of the defendant therein from all claim on the part of the partnership. *ib*

5. How controlled by court.

6. Although the supreme court, on its law side, will exercise a general equitable control over judgments entered upon bond and warrant of attorney, it cannot on motion, relieve against a mistake in the agreement upon which such a judgment is entered up, by which mistake the judgment covers a smaller amount of indebtedness than it was the intention of the parties to secure. *ib*

7. It seems, the remedy of the plaintiff, in such a case, is to file a bill in equity for the purpose of correcting the alleged mistake in the agreement. *ib*

6. Lien of, when not affected by a tender.

8. A tender of the amount due upon a judgment, if the same is not accepted, does not operate as an extinguishment of the lien. *The People v. Beebe*, 379

7. Payment by a stranger.

9. A stranger to a judgment has no right to pay the same, for the purpose of extinguishing the lien thereof, and preventing the holder from redeeming by virtue thereof. *ib*

8. Right of a judgment creditor to redeem.

See DEBTOR AND CREDITOR, 7, 8.

9. Power of court to prevent the bringing of successive suits thereon.

10. Although a party has a right, as a general rule, to bring a suit upon a prior judgment, still the supreme court has such a control over its own process that it ought not to permit it to be perverted, or used for any improper purpose. *Keeler v. King*, 390

11. Where a person who has recovered a judgment, brings successive suits thereon, in different courts, without issuing any execution, and he admits that such suits were brought for the purpose of coercing payment of his debt, by accumulating costs, the court in which the last suit is brought will grant a perpetual stay of proceedings in all the suits in that court except the first. *ib*

12. A plaintiff will not be allowed to make use of the costs in the suit by way of penalty, in order to compel the defendant to pay his debt. *ib*

10. Of discontinuance.

13. Under the section of the revised statutes directing that where a defendant has appeared by putting in and perfecting bail, the plaintiff shall declare against him before the end of the next term, or that judgment of discontinuance may be entered according to the course and practice of the court, the whole matter is left to be determined by the discretion of the court, and according to its course and practice. *The People v. The Justices of the Superior Court*, 478

14. It was the intention of the legislature to vest in the court the power, in cases where the defendant is not in prison, to exercise its discretion in directing a judgment of discontinuance, or not. Courts, therefore, have the right to adopt the practice of enlarging the time, in such cases, for the plaintiff to declare, beyond the end of the next term after the return of the writ, upon proper cause shown therefor. *ib*

15. *Aliter*, where a defendant is committed to prison for want of bail. *ib*

JUDICIARY ACT.

1. The legislature did not intend, by the 55th section of the judiciary act of 1847, to give to the new county courts any judicial power in relation to a judgment in a suit originally commenced in the old court of common pleas. *O'Maley v. Reese*, 643

2. The section of the judiciary act which requires the venue to be laid in a county where some of the parties reside, means parties in interest, and not the nominal parties, or parties to the record. *Hart v. Oatman*, 229

JURISDICTION.

I. GENERALLY.

1. Where a court of equity has acquired jurisdiction of a suit for one purpose, it may retain it for all purposes, which are necessary, in order to afford complete relief. *Frost v. Myrick*, 362

2. The general rule, on the subject of jurisdiction, is that it depends upon the state of things at the time the action is brought; and if the circumstances be such, then, as to vest jurisdiction in the court, the same cannot be ousted by any subsequent event. *Koppel v. Heinrichs*, 449

3. If there is any exception to this rule, it is when such a change in the parties takes place after the commencement of the suit, as to work an abatement. *ib*

4. Courts must obtain jurisdiction as well of the person to be affected by their judgment, as of the subject matter. *In the matter of Flatbush Avenue*, 286

5. It sometimes becomes necessary, especially in proceedings *in rem*, to proceed against persons who are unknown; but courts have no power to do so, unless the legislature has interposed, and by some sort of substituted service, given to the court jurisdiction over the person. *ib*

II. OF EQUITY.

1. *To prevent municipal corporations from wasting the public funds.*

6. Whether a court of equity has jurisdiction to interfere, by injunction, to prevent the common council of a city from wasting the funds of the city, by appropriating them to purposes not warranted by their act of incorporation? *Quere. Adriance v. The Mayor, &c. of New-York*, 19

2. *Where bill is taken as confessed.*

7. In a clear case of want of jurisdiction, the court will, *ex mero motu*, refuse to grant the plaintiff the relief asked for, although the defendants have suffered the bill to be taken as confessed. *ib*

8. But where the jurisdiction of the court is doubtful, if the defendants, by suffering the plaintiff's bill to be taken as confessed, have conceded the jurisdiction of the court, as well as admitted their own delinquency, jurisdiction will be taken of the suit, and the relief asked for granted. *ib*

3. *To appoint new trustees.*

9. Where a trust is created, as to real estate, by the terms of which the trustee is to hold the land to the use of the *cestui que trust*, and to convey the same to such person as the latter shall appoint, the court will not, upon the death of the trustee, appoint a new one in his place. *In the matter of Craig*, 33

4. *To stay summary proceedings for removal of a tenant.*

10. A court of equity has no power to stay the summary proceedings under the 2 R. S. 511, instituted before an assistant justice by a landlord, to remove a tenant holding over after the expiration of his term. *Smith v. Moffat*, 65

5. *Where there is no adequate remedy at law.*

11. If a creditor is unable to recover, in an action at law, a debt due to him, in consequence of some technical rule of law, he may resort to a court of equity. Accordingly, where the executor of a person to whom a bond is given by the will of the obligee, cannot sue thereon, at law, because the obligor is himself the administrator of the obligee, he may file a bill in equity against the obligor, to compel the payment of such bond by him. *Hudson v. Reeve*, 89

12. If a court of equity should think it expedient to interfere, on the ground that there is not a sufficient legal remedy, it ought to do so by a direct decree to that effect, and not by an injunction issued at a preliminary stage of the cause, the indirect effect of which would be to compel the defendant to give up the possession to the complainant. *Akrill v. Selden*, 316

6. *To restrain a trespass.*

13. A court of equity will not interfere to restrain a mere trespass, when the injury is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation. *ib*

14. Unless the injury will be irreparable, the court will leave the party to his remedy at law. *ib*

15. And there is the same reason why a court of equity should not interfere by restoring the complainant to the possession of premises in the occupation of the defendant, viz. that he has an adequate remedy at law. *ib*

7. *To enforce specific performance of an agreement to sing.*

16. A court of equity will not enforce the specific performance of an agreement to sing, in concerts, operas, &c. *Sanguirico v. Benedetti*, 315

17. The difficulty, if not the utter impracticability, of compelling the performance of such an agreement, is a conclusive reason why a court of equity should refuse to interfere. *ib*

18. In such a case the party should be left to his remedy at law. *ib*

See CONSUL, 2, 3, 4, 5.

EXTRADITION, 1, 2, 3, 13.

IDIOTS AND LUNATICS, 3, 5.

INJUNCTION, 1 to 7.

JUSTICES' COURTS.

See AMENDMENTS, 10, 11.

L

LANDLORD AND TENANT.

If a tenant sustains injury or damage by being wrongfully dispossessed of the premises, upon summary proceedings under the statute, he has an adequate remedy by a writ of restitution, from the supreme court, or by an action at law, upon the covenant for quiet enjoyment contained in his lease. *Smith v. Moffat*, 65.

See JURISDICTION, 10.

LEASE.

1. Although a legal forfeiture has been incurred by the lessee of land belonging to the state, which gives to the people the right to re-enter, yet the lessee has an interest in the lease until the forfeiture is enforced, and a contingent right to a new lease, in case the people think it proper to waive the forfeiture and to grant a renewal. *Hesbrook v. Paddock*, 636

2. Such an interest in land will be protected by a court of equity; and a specific performance will be enforced in relation to it. *ib*

LEGACY.

1. The delivery of a bond to a legatee by the executor, in pursuance of a specific bequest thereof contained in the will, vests the property in such bond in the legatee, subject only to contribution in case of a deficiency in the assets, for the payment of the debts of the testator. *Hudson v. Reeve*, 89

2. Where a legatee in a will is appointed executrix thereof, she may, in her character of executrix, assent to the legacy to herself, and such assent will vest the title to the legacy in her. *ib*

3. Legacies payable at a future day are vested, or contingent, according to the intention of the testator. *Tucker v. Ball*, 94

4. Where a testator directs that his executors shall sell his lands immediately after his decease, and pay the interest of the avails to his widow until her marriage, or death, and then divide the avails between certain legatees, the bequests to such legatees will vest immediately. *ib*

5. And the fact that the use of the land is devised to the widow of the testator, and the sale postponed to the time of her death, or marriage, will not make any substantial difference in the rights of the legatee. Nor will the circumstance that the legacy is to be raised by a future sale of real estate, vary the construction of the will; where the sale is postponed on account of the estate for life in the widow, and not with reference to the circumstances of the legatee. *ib*

LIEN.

See SURREGATE, 3.

M

MAIL, (SERVICE BY.)

See PRACTICE, 5.

MANDAMUS.

1. To deprive a party of his remedy by mandamus, on the ground that he has a remedy by action, the remedy by action must not only be adequate, but it must be specific. *In the matter of the Trustees of Williamsburgh,* 34
2. If the only specific remedy a party has is by mandamus, the court will not quash a writ of that nature, on the ground that an action of replevin would lie, or a suit for damages. *ib*
3. If the return to an alternative mandamus is evasive, a peremptory mandamus will be issued. *ib*
4. Upon the coming in of the return to an alternative mandamus, the relator may traverse the return, or any material part of it, by plea. Or, he may demur to the return; and then the cause will be heard as an enumerated motion. He may elect either to pur-

sue that course, or to bring on the case as an non-enumerated motion, founded upon the return; unless the court especially directs formal pleadings to be interposed. *The People v. Beebe,* 379

See CONSTITUTIONAL LAW.
COERS, 3, 4.

MARSHAL, (OF THE UNITED STATES.)

1. A marshal of the United States bears the same relation to the circuit court of the United States that a sheriff does to the county courts in this state; and his duties are very analogous to those of a sheriff. *Corlies v. Waddell,* 355
2. A marshal has no right to receive money upon an estreated recognizance in a criminal case, until an execution has been duly issued and placed in his hands. *ib*
3. And if a surety in a recognizance of that nature, after having waived the issuing of an execution, pays to the marshal the amount due upon such recognizance, he may sue the marshal, while the money is still in his hands, in an action for money had and received, and recover the same back. *ib*

MARSHALLING ASSETS.

It is an unquestionable rule of equity, that where one creditor has a lien on two funds, and another creditor has a lien upon only one of those funds, the latter has a right to demand that the former shall have recourse first to the fund on which he alone has a claim, before resorting to the other. *The Mechanics' Bank v. Edwards,* 271

MASTER EXTRAORDINARY.

See PLEADING, 11, 12.

MAXIMS.

1. It is a maxim of equity, that what has been agreed to be done, and what ought to be done, shall, for the advancement of justice, be regarded as done. *Hasbrook v. Paddock,* 635

2. It is a general maxim of the court of chancery that equity regards whatever is ordered to be done by one having authority—as by a testator in his will—or, what ought to be done, as actually done. *Burch v. Newberry*, 648

MEMORANDUM.

See WITNESS, 4, 5.

MERGER.

1. In 1836, S. & E. conveyed 100 lots to the F. L. and T. Co., by deed in fee, for the consideration expressed therein of \$170,000; upon which the company gave to S. and E. 170 certificates of \$1000 each, each certificate purporting that S. and E. had deposited with the company \$1000 in trust, which was so to remain for 20 years, to bear an interest of 5 per cent; the principal to be payable at the end of 20 years. An agreement and declaration of trust was executed between S. and E. and the company, declaring that the conveyance was on trust, that enough of the \$170,000 of certificates should be applied to paying off incumbrances on the lots, and that the lots should be conveyed by the company, from time to time, to such persons as S. and E. should appoint; the company to receive the rents and purchase money until they should be reimbursed the \$170,000 and interest; upon which they were to reconvey to S. and E. such of the lots as might remain unsold. And S. and E. covenanted to pay to the company any deficiency which might exist, on account of the difference between the avails of such sales and the \$170,000 advanced, with interest. In 1842, S. and E. released to the company their reversionary interest in the lots, and discharged the company from the performance of the trust; and the company discharged them from their indebtedness under the agreement and declaration of trust. *Held*, that the estate of the company, under the trust deed of 1836, did not merge in the release of 1842, so as to let in a decree obtained by the company against S. and E. in 1839, to become an incumbrance on the premises, and to be entitled to priority of payment out of the same. *The Mechanics' Bank v. Edwards*, 271

2. *Held also*, that the trust created by the agreement between S. and E. and the company was such a trust as the company was authorized by its charter to accept and execute. *ib*

3. The doctrine of merger is never regarded with favor in a court of equity. For it as frequently violates, as effectuates, the intention of the parties. *ib*

4. Merger is never allowed in equity, except for special reasons, and to carry out the intention of parties. Estates are kept distinct when the interest of creditors requires it. *ib*

5. The doctrine of merger applies only where there is a legal estate; as where the title and a lien, or a legal and an equitable, or a larger and a lesser, estate meet. *Schermerhorn v. Merrill*, 511

MESNE PROFITS.

1. Where an action of ejectment is brought against the actual occupants of the premises, and a judgment is recovered therein against the defendants, and an action of trespass is subsequently brought, by the plaintiffs in the ejectment suit, against the persons under whom such occupants held the premises, for the recovery of the mesne profits, such plaintiffs, to entitle themselves to recover in the latter action, must show, 1st. That they had, at the time the trespasses mentioned in the declaration were committed, the actual possession of the premises, or a title thereto; 2d. That the defendants entered upon the possession of the plaintiffs, and expelled them, and kept them out of possession; 3d. That the defendants, by their agents, or tenants, received the rents, issues and profits while the plaintiffs were kept out of possession; 4th. That the plaintiffs had, before the commencement of the action for mesne profits, re-entered upon the premises, and regained possession thereof. *Ainslie v. The Mayor, &c. of New-York*, 168

2. And if the plaintiffs prove all these facts, and thus show a right to recover, they can only be allowed to recover the rents and profits of such part of the premises as is proved to have been held by the defendant's authority; and for

- the time during which they were so held, and the value thereof. *ib*
3. If the evidence does not establish each of these facts, the plaintiffs should be nonsuited. *ib*
4. The judgment record, in an action of ejectment against the actual occupants, is no evidence of the plaintiff's title or possession, in an action for mesne profits, brought against the persons of whom such occupants held the premises; where such persons do not claim under the defendants in the ejectment suit. *ib*
5. Such a record is no evidence against any one, other than the defendants named therein, or persons claiming under them by title accruing after the commencement of the ejectment suit. *ib*
6. The fact that persons who are not parties to an ejectment suit, undertake the defence of such suit, and fail therein, will not furnish the slightest evidence of the plaintiff's title, or possession, in an action against such persons for mesne profits. *ib*
7. In an action of trespass for mesne profits, the plaintiff is entitled to recover damages from the time of the demise as laid in the declaration in the ejectment suit, although a period of more than six years be covered; provided the defendant has not pleaded the statute of limitations. *ib*

MISREPRESENTATION.

See AGREEMENT, 12, 13, 14, 15, 16.

MISTAKE.

1. Where an antecedent equity is clearly established in favor of a party seeking relief, and the legal right has been extinguished under circumstances which will authorize an inference of a mistake in fact, a court of equity will presume such mistake, and enforce the claim, to prevent manifest injustice and hardship. *Hyde v. Tanner*, 75
2. Where the legal rights of parties have been changed, by mistake, equity restores them to their former condition, when it can be done without interfer-

ing with any new rights, acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons. *Barnes v. Camack*, 392

3. It is a well settled doctrine, in equity, that a mutual mistake of facts, though such mistake may have been innocently made, is a sufficient ground to avoid a contract. *Taylor v. Fleet*, 471

See JUDGMENTS, 6, 7.

MONEY COUNTS.

See BILLS OF EXCHANGE, 1, 2, 3.

MONEY HAD AND RECEIVED.

If a surety in a recognizance in a criminal case, after having waived the issuing of an execution, pays to the marshal of the United States the amount due upon such recognizance, he may sue the marshal, while the money is still in his hands, in an action for money had and received, and recover the same back. *Corlies v. Waddell*, 355

MONEYS IN COURT.

Method of investing moneys in court, on bond and mortgage; and of ascertaining the sufficiency of the security. *Green v. Ward*, 21

MORTGAGE.

1. When priority postponed, or a cancelled mortgage revived.
1. Where a mortgage is cancelled by the mortgagee, and discharged of record, without actual satisfaction, at the request of the mortgagor and in consequence of his fraudulent representations, and a new mortgage is substituted in its place;—the mortgagor concealing from the mortgagee the fact that, intermediate the date of the cancelled mortgage and the giving of the substituted security, he has given to a third person a mortgage upon the same premises, which has been recorded— a court of equity has the power either to revive the cancelled mortgage, or to give the substituted security a priority

over the mortgage given to such third person. *Barnes v. Camack*, 392

2. A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice. *ib*

3. A subsequent mortgagee who takes his conveyance with notice of a prior mortgage upon the premises, and who subsequently acquires a superior legal title to the premises, by the cancelling of the prior mortgage through mistake, without having parted with any property or right, or placing himself in any worse condition in consequence of the cancelling of the prior mortgage, is not a bona fide mortgagee within the meaning of the recording act and the adjudged cases; and he will not be permitted by a court of equity to retain such superior legal title, to the injury of the prior mortgagee. *ib*

2. Mortgage for purchase money, given to a third person.

4. Where land is sold, and a mortgage for the purchase money is given by the purchaser to a third person, by the direction of the vendor, the latter is to be regarded in equity as the real mortgagee. *Cunningham v. Knight*, 399

3. Mortgagor how protected.

See FORECLOSURE SUITS, 3.

4. Selling, or hypothecating.

5. The selling of a mortgage for less than its nominal amount, does not vitiate the security. *Warner v. Gouverneur's Ex'rs*, 36

6. The hypothecation of an obligation valid in its concoction, as security for a usurious loan, will not render it void, or discharge the debtor from liability thereon. And upon the payment of the amount of the loan, the obligation will be free from all taint. *ib*

5. Set-off.

7. A claim for damages sustained in consequence of the breach of an agreement between a mortgagor and mortgagee, that the latter should release from the lien of the mortgage any parts of the mortgaged premises which the mortgagor might from time to time sell to others, cannot be offset

against the amount due upon the mortgage. *ib*

8. Where an agreement of that nature, between mortgagor and mortgagee, did not specify the quantity of land to be released, nor the terms on which releases were to be given; *Held* that any violation of the agreement, by the mortgagee, would not be the foundation for an equitable offset, unless it was shown that the refusal to give releases was unreasonable, or unconscionable. *ib*

6. Lien how extinguished.

A decree of a court of equity, for the foreclosure of a mortgage, extinguishes the lien of the mortgage; although such decree is merely enrolled and not docketed. *People v. Beebe*, 379

9. After a mortgage has been satisfied by a sale of the mortgaged premises under a decree of foreclosure, neither the mortgage, nor the decree, is any longer a lien upon the premises. *ib*

7. Right of a creditor by mortgage to redeem premises sold under execution.

10. A creditor by mortgage never had a right to redeem premises sold under execution, either as grantee, or creditor, until it was given to him by the act of May 26, 1836. *ib*

11. A creditor by mortgage cannot redeem, under that act, unless his mortgage is a lien and charge upon the whole of the premises sold. If it is a lien upon a portion of the premises, only, it is insufficient. *ib*

MOTIONS.

1. A motion once made cannot be renewed, upon the same papers, or on the same facts, without leave. *Willet v. Fayerweather*, 73

2. The new matter which will alone justify the renewal of a motion, without leave, must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion. *ib*

3. Leave to renew a motion made by a defendant, for liberty to withdraw his

plea, and file an answer, will not be granted, where the testimony has been taken, and the proofs closed as to the matters set up in the plea, and where, since the plea was put in, an important witness in regard to the new defence sought to be set up by answer has died. *ib*

4. Nor will such leave be granted after a co-defendant has, in his answer, set up the same defence which the plea asserts, and the testimony on both sides has been closed on that issue. *ib*

5. Upon a notice of motion for the settlement of issues at law, a party may apply for the award of issues also. *Bailey v. Ryder*, 74

N

NE EXEAT.

1. It is a general rule that if a creditor has an adequate remedy at law, so that he can hold his debtor to bail, by suit at law, he is not entitled to a writ of *ne exeat* from a court of equity. *Pratt v. Wells*, 425

2. The application for a *ne exeat* is addressed to the discretion of the court; and if there is any exception to the rule that the writ will not be issued when the plaintiff has a right of action at law, such exception must be founded upon some difficulty in proceeding at law. *ib*

3. Even where a court of equity has the power to grant the writ of *ne exeat*, it will be very cautious in the exercise of such power. *ib*

4. The fact that there has been a previous holding to bail at law, from which the defendant has been discharged, is a fatal objection to an application for the writ. *ib*

NEW TRIAL.

See EVIDENCE, 4.

NON-IMPRISONMENT ACT.

See DEBTOR AND CREDITOR, 9 to 15.

NOTICE.

See MOTIONS, 5.

O

OATH.

See PLEADING, 11, 13.

OLD AGE.

See WILL, 9.

ONONDAGA SALT-LOTS.

1. The diversion or use of a *part* of a lot leased by the superintendent of the Onondaga salt springs for the manufacture of salt, for other purposes—e. g. the erection of dwelling houses, barns, &c.—will not work a forfeiture of the premises to the people of this state. *Hasbrook v. Paddock*, 635

2. The statute declaring that the diversion or use of salt-lots, for other purposes than the manufacture of salt, shall work a forfeiture of the estate of the lessee, and divest him of his interest therein, does not apply to the diversion of a *part* of a lot. It only prohibits the diversion and use of *an entire* lot, for purposes foreign to the object of the lease. *ib*

3. Neither the making of a contract for the exchange of parts of lots held under a lease from the superintendent of the Onondaga salt springs, nor the execution of a conveyance of such parts, by the lessee, will work a forfeiture of the premises, to the people; although such contract and conveyance are in general terms, and contain no restriction upon the grantee, as to the manner in which the premises are to be occupied and used. *ib*

ONUS PROBANDI.

It is incumbent upon a party who sets up a voluntary conveyance executed under suspicious circumstances, to show

affirmatively that the transaction was fair and honest. *Sears v. Shafer*, 408

ORDER.

See *BILLS OF EXCHANGE*, 1, 2, 3.

ORIGINAL BILL, AND ORIGINAL BILL IN THE NATURE OF A SUPPLEMENTAL BILL.

1. Nature and office of an original bill. *Butler v. Cunningham*, 85
2. An original bill in the nature of a supplemental bill embraces, in some degree, the qualities of both an original bill and a supplemental bill. *ib*
3. The foundation of a bill of that description is an event occurring after the commencement of a suit in a court of equity, which event is of such a nature that the suit cannot be continued, as to all the parties, by a mere supplemental bill; and therefore, in regard to those parties, it partakes of the character of an original bill. *ib*
4. If the event determines the interest of one of several defendants, and his interest becomes vested in another, by title not derived from the former, the present owner of the interest must be brought in by an original bill in the nature of a supplemental bill. *ib*
5. So also, in case one of several plaintiffs is deprived of his interest in the suit, the defect may be supplied by such a bill; which is an original bill as to the new parties and new interests, but supplemental as to the old parties and the old interests. *ib*
6. And if a sole plaintiff assigns his whole interest, or is deprived of it, subsequent to the commencement of the suit, as in case of bankruptcy, the plaintiff being no longer able to proceed, for want of interest, his assignees can only obtain the benefit of the proceedings by a bill of this kind. *ib*
7. But a person whose claim is not founded upon an event happening since the filing of the original bill, but upon an assignment made to him by the plaintiff, prior thereto, has no right to file an

original bill in the nature of a supplemental bill. *ib*

OVERSEERS OF THE POOR.

See *ERROR*, 3, 4.

P

PARTIES.

1. Separate purchasers of different parcels of the same lot cannot join in a bill against the former owner, to restrain the prosecution of separate ejectment suits commenced by him against the complainants. *Wood v. Perry*, 114
2. Nor can they unite in a bill against such former owner, to compel the performance of a prior contract for the sale and purchase of such lot, between the former owner and another person, upon the ground that such prior contract has been assigned to one of the complainants, as well in his own behalf as to protect the interests of his co-complainants; where there is nothing, beyond the averment in the bill, to show that the purchase or transfer of such contract was for the benefit of all the complainants, or was made at their request, or with their assent. *ib*
3. Persons having distinct claims against another, arising upon separate and independent contracts, cannot join in a bill to enforce such claims; where there is no proof of a common interest in the subject matter. *ib*
4. To allow persons having distinct claims against the same individual to maintain a joint suit against him merely because the act of one may, if valid, incidentally prove beneficial to the others, might be productive of great oppression and injustice. *ib*

See *AMENDMENTS*, 3.
PARTITION, 1, 2, 3.

PARTITION.

1. Parties.

1. A widow entitled to dower in an undivided share of premises held in common, even before the assignment of her

dower, is a necessary party to a suit in chancery for the partition of the premises. *Green v. Putnam*, 500

2. In proceedings for the partition of land, either at law or in equity, it is not necessary, though in most cases it is advisable, to make persons parties who are entitled only to dower in the premises, which has not been admeasured, and which extends to the whole of the premises of which partition is sought. *Tanner v. Niles*, 560

3. If the dower extends to the whole of the premises held in common, there is no reason for making the doweress a party, except where a partition of the premises cannot be made without great prejudice to the owners thereof, and a sale therefore becomes necessary; in which case there is a manifest propriety in making her a party, as the purchaser will hold the land purchased by him, free and discharged from the dower interest; provided the doweress has been made a party. *ib*

2. Compensation for improvements.

4. Where one tenant in common lays out money in improvements on the estate held in common, although the money so expended does not in strictness constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account, and a suitable compensation; or else, in the partition, it will assign to such tenant in common that part of the premises on which the improvements have been made. *Green v. Putnam*, 500

5. To entitle a tenant in common to an allowance, on a partition in equity, for improvements made by him on the premises, it is not necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part to contribute their share of the expenses; nor a previous request to join in the improvements, and a refusal. *ib*

6. A grantee of the tenant in common who made the improvements on the premises, will be entitled to the same compensation for the improvements which the tenant in common himself would have been entitled to, had he continued the owner of an undivided share of the premises. *ib*

3. Who bound by judgment, or decree.

7. Where an actual partition and division of the land among the joint tenants and tenants in common takes place, the judgment or decree in partition will not affect the tenant, or person having a claim as tenant in dower to the whole premises. *Tanner v. Niles*, 560

4. Dower interest.

8. The statute does not, in any case, contemplate a setting off of admeasurement of a dower interest, in a partition suit. *ib*

PARTNERSHIP.

1. On the 30th of April, 1845, upon the termination of a copartnership between W. L. N. & I. H. B., under the firm of N. & B., a new copartnership was formed between I. H. B. and T. B. the plaintiff, as their successors in business, under the name of I. H. B. & Co., to commence on the 1st of May. Previous to the time when the new partnership commenced, I. H. B. paid and took up outstanding notes of the old firm to the amount of \$10,000, and received in payment for that advance the draft of N. & B. upon J. T. S. & Co., for \$3000, and their order upon J. T. S. & Co., dated May 1, 1845, requesting them to deliver to I. H. B. & Co., or order, certain specified drafts, or their avails, to the amount of \$6228.88, which J. T. S. & Co. had previously received from N. & B., for collection; the new firm giving their note to N. & B., for \$940.93, the difference between the \$10,000 paid by them and the amount of N. & B.'s draft and order. The order was, on the day of its date, endorsed and sent by I. H. B. & Co., to J. T. S. & Co., by mail, in a letter requesting the latter to acknowledge the receipt of the drafts called for by the order, and hold them for collection on account of I. H. B. & Co., and to sell two of such drafts, and credit the proceeds. On the 9th of May the drawees of the order wrote to the drawers, merely acknowledging the receipt of such letter and order from them, and promising to refer to such order in their next letter. On the 16th of May J. T. S. & Co. failed; without having complied with the requirements of the order; and having, in fact, parted with the drafts therein mentioned, and used and converted the proceeds of the sale

- for the purposes of their business, generally, previous to the date of the order, by virtue of a general authority as the agents of N. & B., to sell any paper of theirs whenever their account required it. Up to the time of their failure J. T. S. & Co. maintained a good credit and paid all legal demands when presented. On a bill filed by T. B. against I. H. B. & W. L. N., claiming that by reason of the failure of the drawees to meet the order, I. H. B. & Co., the holders, became entitled to receive from N. & B. as the drawers, in proportion to their shares and interest, the amount which they had paid for the order on J. T. S. & Co., and praying that W. L. N. might be decreed to refund and pay over to I. H. B. & Co. the moiety of such amount for which he was liable: *Held*, 1. That the transaction between I. H. B. and the old firm of N. & B. was to be regarded as an adjustment and settlement, *pro tanto*, of the copartnership business of that firm, and as a *purchase* by, and a transfer to, I. H. B., one of the copartners, of all the effects of the firm then remaining in the hands of J. T. S. & Co. *Burch v. Neuberry*, 648
2. That at the time of the assignment of the drafts, or their avails, by N. & B., a fund representing such drafts was in the hands of J. T. S. & Co. subject to be transferred by any lawful contract or assignment executed by N. & B. *ib*
 3. That T. B., the plaintiff, deriving his title to relief under the order of N. & B. upon J. T. S. & Co., he became jointly interested with I. H. B. in the fruits of his purchase of the partnership funds, and merely succeeded to an undivided moiety of his interest therein. *ib*
 4. That the agreement was a fair one, without fraud or warranty, and was binding upon both parties; that the new firm were the absolute owners of the entire beneficial interest in the fund; and that the loss thereof, by the failure of the drawers sixteen days after the date of the order, fell upon them, and furnished no ground for relief to the plaintiff, against W. L. N. *ib*
 5. That the order upon J. T. S. & Co. was not a bill of exchange, or an order drawn on a particular fund, but was an assignment of the fund to the holders, and transferred the property therein to them; especially after the presentment of the order. *ib*
 6. That the conduct of J. T. S. & Co., instead of being a refusal to comply with the order, was to be regarded as an acquiescence in its directions, with a postponement of an immediate compliance therewith. *ib*
 7. That J. T. S. & Co. being requested to deliver and receive the fund, themselves, for the new firm, were to be presumed to have performed that duty; inasmuch as they had the money in their possession. That upon the receipt of the order, and of the letter of I. H. B. & Co. they were thenceforward the holders of the fund as the agents of that firm; and the omission to place it formally to the credit of I. H. B. & Co., or to acknowledge the holding of it for them, was the neglect of an act to be done as the agent of that firm solely. And that by the omission of that act N. & B. ought not to be prejudiced. *ib*
 8. That the payees of the order were bound to use reasonable diligence in presenting the same to the drawees, and demanding payment. That a demand of payment made by J. T. S. & Co. of themselves, was no such demand as the law contemplates when it holds the party to the use of a reasonable diligence; but that a demand should have been made by some third person authorized to receive the actual possession of the fund. *ib*
- See AGREEMENT, 2, 3.
- PETITION
- See INSOLVENT CORPORATIONS.
- PLEADING.
- I. AT LAW.
1. Declaration, when to be put in.
- See JUDGMENTS, 13, 14, 15
2. Plea.
1. If a plea is bad in substance, the plaintiff is entitled to judgment, upon demurrer, although his replication is bad. *Halliday v. Noble*, 137
 2. Where a declaration charges the defendant with having committed a tres-

pass on a particular day, if the defendant pleads an act of his done on a previous day, as a justification, he should traverse the commission of the trespass on any other day, either before, or after, the day mentioned in his plea, and before the commencement of the suit. *ib*

3. In such a case, the justification, if true, applies only to the particular day laid in the plea; and without a traverse it would imply an admission that the trespass complained of was committed on any other day than that. *ib*

4. A special plea, in an action for an assault, battery, and false imprisonment, ought either to deny the trespass alleged in the declaration, or to state such facts as will show that the imprisonment was lawful. *ib*

3. *Election between pleas and demurrers.*

5. Where the declaration, in an action of covenant, contained several counts, in each of which the instrument counted upon was set out, and but one breach assigned; and the defendant, after craving oyer, pleaded *non est factum*, and then demurred to each count generally, commencing the demurrer substantially as follows: "And the said defendant says that the first count of the said plaintiff's declaration is not sufficient," &c.; *Held* that the defendant was bound to elect whether he would abide by the pleas, or by the demurrers. *Angell v. Kelsey*, 16

6. The rule that a party cannot plead and demur to the same pleading, is applicable to such a case. *ib*

7. Each breach assigned in a declaration is to be considered a distinct count, for the purposes of pleading; and the covenant as set out is applied to each breach. *ib*

8. Where several breaches are assigned, the defendant may demur to one, and plead to the others. But where the count is indivisible, he cannot plead to part, and demur to part. *ib*

II. *In Equity.*

1. *Answer.*

9. Where a creditor's bill calls upon the defendant to state whether, at the time of filing such bill, he possessed, owned

or had any interest in, any real estate, or chattels real or any personal property, an answer stating that since the recovery of the plaintiff's judgment the defendant *had not been interested in any property* of any kind; and that no person had held any real estate or personal property, or interest therein, in trust for him, or for his benefit, in possession or otherwise, is to be regarded as substantially meeting the inquiry. *Wendell v. Shaw*, 462

10. Where the bill requires the defendant to state the situation of his property and effects at the time of filing the bill, and the defendant answers that *at the time of the rendition of the plaintiff's judgment* he had no interest in any property, and that he *had not had, at any time since*, this is a sufficient answer to the inquiry. *ib*

11. A master extraordinary in England has no power to take the oath of a person residing there, to an answer to a bill in chancery filed against such person in this state. *Lahens v. Fielden*, 22

12. An answer put in by a defendant residing out of the state, must be sworn to before a judge of some court having a seal; who is actually a member of such court. And that fact must be certified by the clerk of the court. *ib*

2. *Plea.*

13. A plea in equity is a special answer, setting forth and relying upon some one fact, or several facts, tending to one point, sufficient to bar the suit. Its office is to reduce so much of the cause as it professes to answer, to a single point. *Davison v. Schermerhorn*, 480

14. Where a bill, in order to avoid the effect of a plea of the statute of limitations, alleges a promise within six years, the defendant must deny such promise by averment in his plea, and put in an answer, in support of the plea, containing a like denial. *ib*

15. But where the bill does not state a new promise within six years, the plea should not contain a denial of such a promise. If it does so, however, the plea, though informal, will not be objectionable for duplicity. The denial of a new promise is not a new matter of defence, but is intended to aid the defence of the statute of limi-

tations; and it may be treated as surplusage. *ib*

16. A defendant putting in a plea to a bill in equity must, in such plea, express distinctly to what part of the bill he intends to plead. The parts of the bill to which the plea is intended to apply should be so clearly defined as that the court, on looking at the bill, can determine what parts are covered by the plea, and what are not. *ib*

3. Demurrer.

17. After an order has been regularly obtained extending the time to answer, it is irregular for the defendant to demur. *Davenport v. Sniffen*, 223

18. Nor can a defendant, after having obtained an irregular order extending the time to answer, demur while such order is in force, and before the same is vacated. *ib*

4. Replication.

19. Where the plaintiff, within five days after the time for replying had elapsed, served a replication upon the defendant, who refused to receive the same, in a case where the bill and the answer had both been sworn to, and they differed from each other very materially; and the delay in serving the replication had been accounted for; *Held* that it was a case in which a replication was necessary, to enable the court to ascertain the facts; and leave to file the same was granted. *Micklethwaite v. Rhodes*, 57

PLEDGING.

The act of pledging a note does not pass the title to the pledgee; but the title remains in the pledgor. *Latourette v. Williams*, 9

POLICY OF INSURANCE.

See EQUITABLE ASSIGNMENT.

POWERS.

1. A general power in trust is where an authority is given to the grantee to do some act, in relation to lands, which

the grantor might himself lawfully perform; and where he is authorized to alienate the lands in fee, by means of a conveyance to any alienee whatever; and where some persons, other than the grantee of the power, are designated as entitled to the proceeds or other benefits, to result from the alienation according to the power. *Selden v. Vermilyea*, 58

2. A power is irrevocable if no authority to revoke it is reserved or granted in the instrument creating it. And it is imperative if its execution is not made expressly to depend upon the will of the grantee, and if it imposes on the grantee a duty, the performance of which may be compelled in equity, for the benefit of the parties interested. *ib*

3. Where a power to sell real estate is founded upon a valuable consideration, such as the surrender, by one or more of the owners, of a preference which they have obtained, and no power of revocation has been reserved, the power to sell is irrevocable, and imperative. *ib*

PRACTICE.

I. AT LAW.

1. In criminal cases.

1. A criminal case cannot be moved out of its order on the calendar, by the defendant, unless the notice of argument states his intention of bringing it on out of its order. *Barron v. The People*, 136

2. That part of the 97th rule which gives to the counsel for the people, alone, the right to move cases out of their order on the calendar, applies only to the first week in term. After that, either party, on a four days' notice, may bring on the argument of the cause out of its order. *ib*

2. Commission to examine witnesses.

3. After the testimony of a witness has been taken, upon a commission, and the commission returned, the party cannot have a new commission, to re-examine the witness, merely on the expectation that he may now swear more definitely than before; in the absence of any suggestion that the wit-

- ness has made a mistake, or that new evidence has been discovered. *Raney v. Weed*, 220
4. More especially will such an application be refused where the only other witness who was cognizant of the facts to which the witness is sought to be re-examined is dead. *ib*
3. *Service of papers by mail.*
5. Where papers are served by mail, in the manner directed by the rules, the risk of miscarriage is with the party to whom they are directed. *Jacobs v. Hooker*, 71
4. *Bill of particulars.*
6. Where, from the nature of the action, the knowledge of the facts on which the plaintiff's claim rests is more with the defendant than with the plaintiff, the latter will not be required to furnish a bill of particulars, until he has obtained, or at least had an opportunity to obtain, a discovery from the defendant. *Young v. De Mott*, 30
7. A defendant is entitled to a bill of particulars of the plaintiff's demand, upon counts in special assumpsit, as well as upon the common money counts. *Wetmore v. Jennys*, 53
8. A bill of particulars in these words, "to the first special count, damages \$5000," and the same as to each of the other special counts in the declaration, is insufficient. *ib*
9. So of a bill giving the following specification of the plaintiff's claim upon the money counts, "balance due on settlement, &c. \$5000." *ib*
10. So of a bill containing this particular as to the money counts: "money received at New-Orleans on account of plaintiff, \$5000," without specifying any date. *ib*
5. *Filing new replevin bond.*
11. The court will allow a new replevin bond to be filed, *nunc pro tunc*, where the one given upon the execution of the writ was defective. *Newland v. Willetts*, 20
6. *Turning a case into a bill of exceptions.*
12. It is not a matter of course to allow a party to turn a case into a bill of exceptions. *Clark v. Brown*, 215
13. On a case, the decision of the supreme court is final; but on a bill of exceptions, the parties can carry the cause to the Court of Appeals. Whether they shall be allowed to do so must depend upon the gravity of the case, and the nature of the questions involved. *ib*
- II. IN EQUITY.
1. *Generally.*
14. The rules of the court ought not to be used for purposes of oppression, or in order to bring about a determination of the case upon technicalities, at the expense of the substantial merits. *Micklethwaite v. Rhodes*, 57
2. *Power of a judge at chambers.*
15. A judge, at chambers, has no power to grant an order extending the time to demur. That can be done only by the court. *Davenport v. Sniffen*, 223
3. *Commission of rebellion.*
16. The interrogatories upon which a defendant is examined, on a commission of rebellion, should be confined to the fact of the service of the order or process, and to the acts constituting the violation thereof. They should not relate to any previous proceeding. *Brown v. Andrews*, 227
4. *Suppressing depositions.*
17. The practice of moving to suppress depositions, previous to the hearing, does not prevail in this court. *Williamson v. More*, 229
18. Depositions can only be suppressed at the hearing. *ib*
5. *Order of reference to settle issues.*
19. Form of order of reference to settle issues of fact under the 59th rule in equity, preparatory to taking testimony. *Miller v. Wilson*, 222
- PRESIDENT OF THE U. S.
- See EXTRADITION*, 4, 6, 14, 17.

PRESUMPTION.

1. Where, upon the purchase of land, a deed is executed by the vendor, and a mortgage upon the land purchased is executed by the purchaser, and both conveyances are acknowledged and recorded at the same time, the presumption is that they were executed simultaneously, and that the mortgage was intended to secure the purchase money, although given to a third person, instead of the vendor, by the direction of the latter. *Cunningham v. Knight*, 399
2. Where the witnesses to a will are dead, or from the lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence existing, presumes the instrument properly executed, if there are no circumstances of suspicion; particularly where the attestation clause is full. *Butler v. Benson*, 526

PRINCIPAL AND AGENT.

1. The defendant, and B. contracted with N. for the purchase of a farm of about 100 acres belonging to him at F., at the price of \$350 per acre. Prior to receiving a deed therefor, the defendant applied to the plaintiff and V. to join him in the purchase of lands at F.; to which they assented, and authorized him to make the purchase for their joint benefit and account, on the best terms he could. He then contracted with S. & S. for the purchase of 52 acres more at \$300 and \$250 per acre. This purchase also included certain wood and meadow lands. Subsequently the defendant represented to the plaintiff and V. that he had effected a purchase of lands from N. and from S. & S. at the prices of \$400 and \$350 per acre, on the joint account; concealing from them the fact that he, together with B., already had contracts for the land, and concealing from them also the fact of the purchase of the wood and meadow lands. The plaintiff and V., relying on the representations of the defendant, as to the price at which the lands were bought, paid to him their respective portions of the cash payments required to be paid, and of the expenses attending the purchase. The conveyances of the lands purchased were taken in the name of the

defendant. When the deeds were executed, false considerations were inserted therein, for the purpose of carrying out the deception practised upon the plaintiff and V. The result was that of the lands which were contracted to be purchased by the defendant and B., for about \$45,000, two-thirds were sold to the plaintiff and V. at the rate of upwards of \$58,000, after reserving to the defendant the meadow and wood lands; which the defendant conveyed to B. without the knowledge of the plaintiff and V. Upon a bill filed by the plaintiff, praying for an account, and for payment to him by the defendant of all sums paid to the defendant by the plaintiff, over and above his share or proportion of the actual purchase money of the premises; and for an account of the avails of the wood land and meadow, and for the payment to the plaintiff, of an equal share thereof; *Held*, that the defendant acted as the agent of the plaintiff and V. in consummating the purchase; and that as such agent he had no right to become himself the seller, or to make a profit out of his principals. *Willink v. Van derveer*, 598

2. *Held also*, that the plaintiff was entitled to an account of the profits made by the defendant, out of him, on the purchase of the premises, including the value of the wood land and meadow, and to a decree for the re-payment of the excess of moneys paid by him, over and above his proportion of the price paid by the defendant for such premises, with interest; and that in ascertaining such excess, the defendant should be charged with the value of the wood land and meadow. 598

PRISONER.

See EXTRADITION, 14, 16.

PRIVATE PROPERTY.

See STREETS, 1, 2, 4.

PRIVILEGED COMMUNICATIONS.

Words imputing the commission of a crime are privileged, if addressed to police officers while engaged in the in-

vestigation of such crime, it seems. *Smith v. Kerr*, 155

PROMISSORY NOTES.

See HUSBAND AND WIFE, 1, 2, 3.
PLEDGING.

R

RECEIVER.

1. In creditors' suits.

1. A receiver will not be appointed in a creditor's suit where it appears from the bill itself that the plaintiff's remedy at law has not been exhausted. *Starr v. Rathbone*, 70

2. In mortgage cases.

2. Where a mortgagee has not provided for keeping down the accruing interest upon the mortgage, by securing a lien on the rents and profits, the court will interfere with the mortgagor's possession, prior to a decree of foreclosure, and appoint a receiver of the rents and profits, if the premises are an inadequate security for the debt secured by the mortgage, and the mortgagor, or other person in possession, who is personally liable for the debt, is insolvent. *Warner v. Gouverneur's Ex'rs*, 36

3. But a receiver will not be appointed, upon a mere allegation that the mortgaged premises are not an adequate security for all just incumbrances thereon. The mortgagee applying for a receiver must allege, in his bill, that the premises are not an adequate security for the amount due to him. *ib*

See DEBTOR AND CREDITOR, 4.

RECITALS.

See ESTOPPEL, 2.

RECOGNIZANCES.

1. Recognizances in criminal cases should not be made returnable before a judge, at chambers; and if made returnable in that manner, the prisoner is not bound to appear there. *Carlise v. Waddell*, 355

2. They should be made returnable before the court, at a term thereof. *ib*

See MARSHAL OF THE U. S.

REDEMPTION OF LANDS.

See DEBTOR AND CREDITOR, 7, 8.
JUDGMENTS, 9.
MORTGAGE, 10, 11.

REFERENCE.

1. It is the right of a party, when he is required to produce books for inspection, upon a reference, if such books contain accounts and transactions which in no way relate to the subject of examination, to seal up such parts of the books; so that they shall not be exposed to the observation of those who have no right to examine them. *Titus v. Cortelison*, 444

2. Where books are produced by a party, upon a reference, with portions thereof sealed up, his affidavit stating that those portions do not relate to the matters of the reference is to be taken, in the first instance, as sufficient to protect them from examination. But if the adverse party can show any fair grounds for supposing the parts sealed up to be material, the court may order them to be opened. *ib*

3. But before coming to the court for an order directing the opening of those parts of the books which have been sealed up, the adverse party should first apply to the referee for such an order. *ib*

4. When an injunction is dissolved upon the matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction; and the defendant is entitled to a reference to ascertain his damages, under the 31st rule of the late court of chancery, which corresponds with the 21st rule in equity of the supreme court. *Dunkin v. Lawrence*, 447

5. But when the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not to be deemed to have been made until the final hearing and decision of the cause. *ib*

6. A reference to ascertain the amount of damages sustained by the plaintiff will not be granted, after a default for want of a plea, upon a mere general affidavit that the inquiry involves the examination of a long account: but the production of a sworn copy of the account on which the suit is brought will be required. *Brown v. Miller*, 24

RELEASE.

1. A release executed to one of several joint covenantors in a charter-party, absolute in its terms, and containing no reference to the "act for the relief of partners and joint debtors," passed April 18, 1838, does not fall within the provisions of that act. *Hoffman v. Dunlop*, 185
2. Such a release is to be construed with reference to the common law. And viewed in that light, it is a discharge of all the joint covenantors. *ib*

REPORT OF REFEREES.

Where there is evidence on both sides upon a question of fact, the verdict of a jury, or report of referees, will not be set aside on the ground that it is against the weight of evidence. *Esterly v. Cole*, 235

REPORT OF COMMISSIONERS OF ESTIMATE AND ASSESSMENT.

See STREETS, 4 to 7, 9.

RES GESTÆ.

See DECLARATIONS, 4.

S

SEPARATION.

See ALIMONY.
HUSBAND AND WIFE.

SERVICE OF PAPERS.

See PRACTICE, 5.

SET-OFF.

See MORTGAGE, 6, 7.

SHERIFFS' SALES.

1. The right and title of a judgment debtor to real estate belonging to him which has been sold by the sheriff upon execution, is not divested, by the sale, until the expiration of the fifteen months allowed for redeeming. *Schermerhorn v. Merrill*, 511
2. And the deed given by the sheriff to the purchaser at a sale upon an execution will not relate back, so as to give to the purchaser a legal estate which will merge a mortgage previously given to him by the judgment debtor, upon the land sold. *ib*
3. Even after the time for redemption has expired, the naked legal estate continues in the judgment debtor. And the purchaser's interest, before deed, is but a lien, or a conditional right. *ib*

SLANDER.

See PRIVILEGED COMMUNICATIONS.

SPECIAL CONTRACT.

See BILLS OF EXCHANGE, 1, 2, 3.

SPECIFIC PERFORMANCE.

See AGREEMENT, 11.

STATE MAGISTRATES.

See EXTRADITION, 1, 12.

STATUTES.

1. Where a remedy is sought to be obtained by a summary proceeding under a statute which is in derogation of the common law, the statute is to be strictly construed. *Smith v. Mafai*, 65

2. But where the object of a statute is remedial, it is to be construed liberally, so that it may carry out the purposes for which it was designed. *ib*

3. Hence, when looking at the remedy, courts have taken care that it should be made effectual, if possible, in the manner intended. *ib*

4. But when scanning the proceedings to attain that remedy, courts have been strict and rigid in exacting a compliance with all the requisites of the statute. *ib*

5. Where the words of a statute are susceptible of two meanings, one favorable, and the other hostile, to its principal design, the former should prevail, and control the construction. *Per Strong, P. J. Lott v. Wyckoff, 565*

6. Statutes creating penalties or forfeitures are to receive a strict construction. And it is no part of the duty of courts to extend the meaning of the words and phrases employed by the legislature. *Hasbrook v. Paddock, 635*

STAYING PROCEEDINGS.

See JUDGMENTS, 10 to 12.

STILWELL ACT.

See DEBTOR AND CREDITOR, 9 to 15.

STREETS.

1. When private property is to be taken for the public use, it is important that all the forms of the law should be complied with; for those forms have been devised, and certain restrictions adopted, for the protection of private right against public oppression. *In the matter of Flatbush Avenue, 286*

2. In all cases of public improvements, where private property is to be taken without the owner's consent, at the demand of a local corporation, it is essential to inquire whether all the requisitions of the statute have been complied with. And courts cannot allow any essential departure from them, without

jeoparding private rights, which have no adequate protection except in our courts. *ib*

3. The acts of the legislature relative to the city of Brooklyn, and the opening of streets and avenues therein, give no authority to proceed against unknown owners of lands; and if any of the owners of land required for a street are unknown, a lawful assessment cannot be made. *ib*

4. It is an inflexible rule of law, that no man shall be deprived of his property without an opportunity of defending himself. Upon this principle, a report of commissioners of estimate and assessment will not be confirmed if it contains an assessment upon property in Brooklyn belonging to unknown owners. *ib*

5. What degree of particularity is necessary, in describing the owners of property assessed for the opening of an avenue in the city of Brooklyn. *ib*

6. The commissioners are required by the statute, to specify in their report the respective interests of the owners, the amount awarded to the several parties interested, the amount assessed upon the different interests in the premises affected, and to designate the interests of the parties, and their liabilities in relation thereto. And if their report does not contain these particulars, it will not be confirmed. *ib*

7. It is the duty of commissioners of estimate and assessment in the city of Brooklyn, to estimate the expenses of opening a street or avenue. This includes not merely the costs and expenses of making the assessment, but also the costs and charges of making the improvement, and the amounts to be paid for the lands and buildings required to be taken for it. And the several items of the expense should be stated in the report. *ib*

8. The commissioners are also required to estimate the benefit to be derived from the improvement, not only in the aggregate, but that to be derived by the parties respectively. *ib*

9. Where it appeared from the report of commissioners respecting the opening of an avenue, that such avenue crossed a public turnpike at two distant points, and thus opened a road

whereby travellers could avoid the toll gate of the company, thereby materially injuring, if not destroying, the value of the franchise; for which injury the commissioners had not awarded any damages, but they had awarded the company two small sums for the damage arising from taking the road for the avenue, and had assessed them an equal amount for the expense of opening the avenue; the court refused to confirm the report. *ib*

10. The franchise which a turnpike company obtains from the legislature, by its act of incorporation, is as much the subject of value to the company as the private property of any individual. And they have as clear a right as any person owning land to be indemnified for an injury sustained by them in consequence of the appropriation of their property to the public use. *ib*

11. The doctrine that because a turnpike company derived its franchise from the same source from which the city of Brooklyn obtained its power to open an avenue, therefore the company are not entitled to any compensation for an injury to their property, is untenable. *ib*

12. The 40th section of the act incorporating the city of Brooklyn, which authorizes the common council to cause all the streets within the first seven wards of the city to be graded, levelled, gravelled and paved, to assess the expenses upon the owners of the lands benefitted, and to collect the money, necessarily gives to them the power to make the requisite contracts, and devolves upon them the duty of performing them, on their part. *Brady v. The Mayor, &c. of Brooklyn*, 584

SUMMARY PROCEEDINGS.

See JURISDICTION, 10.
LANDLORD AND TENANT.
STATUTES.

SUIT.

See ERROR, 5.

SUPPLEMENTAL BILL.

What is a supplemental bill. *Butler v. Cunningham*, 85

SURPLUS MONEYS.

See FORECLOSURE SUIT, 2.

SURROGATE.

1. Under the provisions of the title of the revised statutes respecting the powers and duties of executors and administrators in relation to the sale and disposition of the real estate of their testator or intestate, for the period of three years after the granting of letters testamentary or of administration, the real estate of which the testator or intestate died seized, remains liable to be sold, under an order of the surrogate, for the payment of debts, in case of a deficiency of personal assets. *Hyde v. Tanner*, 75

2. This liability attaches to lands, not only in the hands of the heirs or devisees, but in the hands of any subsequent purchaser. *ib*

3. It is a kind of statutory lien running with the land, during the three years. *ib*

4. After the expiration of that period, the heirs or devisees become first liable to suit, and the power of the surrogate ceases. The land is discharged from the lien; the heirs or devisees may sell; and a *bona fide* purchaser takes the estate free and discharged from the debts. *ib*

5. A surrogate, upon an accounting by administrators before him, on the application of creditors, is authorized to give a preference to a charge made by the administrators for rent paid on a lease of premises held by the intestate, if it appears to his satisfaction that such preference will benefit the estate. And where a surrogate gives a preference of that nature, and certifies, in his decree, that it appeared to his satisfaction that it would benefit the estate, his decree is conclusive upon that point. And the appellate court will not inquire whether there was any proof of that fact before the surrogate. *Hovey v. Smith*, 379

T

TENDER.

1. Whenever a tender is made, and is insisted on in the pleadings, the credit-

or is at least entitled to the amount tendered. *Wood v. Perry*, 114

2. Where the debtor admits a certain amount to be due, by making a tender thereof, it is not a point at issue between the parties, so far as he is concerned; and the creditor is not required to establish the amount by proof. *ib*

3. A tender of the amount due upon a judgment, if the same is not accepted, does not operate as an extinguishment of the lien. *The People v. Beebe*, 379

TIME.

See AGREEMENT, 17.

TREATIES.

See EXTRADITION, 4 to 10, 15, 16.

TRESPASS.

See JURISDICTION, 13, 14, 15.
MERE PROFITS.

TRUSTS.

A trust to sell lands, and divide the proceeds among the *cestuis que trust*, as beneficiary owners, and not as creditors, is void as a trust, but is valid as a power in trust. *Selden v. Vermilyea*, 58

See JURISDICTION, 9.

TURNPIKES.

See STREETS.

U

UNITED STATES.

See DAMAGES.

USURY.

1. *What amounts to.*

1. Lending uncurrent money, upon an agreement that the amount loaned shall be repaid in current funds, does not amount to usury, where the discount upon the money loaned is very trifling, and the same will pass current in the market, in the way of trade. *Slosson v. Duff*, 432

2. Such a loan is not a violation of the statute, unless there is something in the transaction from which it is to be inferred, as a matter of fact, that it was a mere contrivance to obtain more than the legal rate of interest, by loaning bills which were not intrinsically worth their nominal amount; and where it does not appear that the money loaned was not worth, to both parties, the amount at which it was received by the borrower. *ib*

3. It is not usurious for a vendor to require the assignee of a contract for the purchase of land, to pay the costs of a suit instituted by the vendor against the assignor upon a note given for back interest, as a condition of discontinuing an ejectment suit, brought against the assignee, for the recovery of the land, and of giving time for the payment of the principal sum due. *Townsend v. Corning*, 627

4. The assignee of a contract for the purchase of land, takes the land subject to all the equities and liabilities resting upon the assignor at the time of the assignment. He is therefore equitably bound to pay the costs of a suit brought by the vendor against the assignor, upon a note given for the back interest due on the contract at the time of the assignment. *ib*

5. Interest upon interest cannot be collected by law, except upon an agreement to pay it, made after the day of payment has passed. But if it be paid voluntarily it is not usury. And it may be lawfully included in a note, by the agreement of the parties; without rendering such note usurious. *ib*

6. But a reservation, in a new security, of compound interest which had accrued upon a sum previously due, made against the will of the debtor,

and as a condition of forbearance upon the new security, affects the new security with usury, and renders it void. *ib*

2. *Who may set it up.*

7. *It seems that the plaintiff in a junior judgment cannot set up the defence of usury against the claim of a plaintiff in a prior judgment to the surplus moneys arising from the sale of premises upon which both judgments are liens; without consenting to the allowance of the amount actually due upon the prior lien. Slosson v. Duff, 432*

8. *It is not competent for a subsequent mortgagee to set up usury in the first lien. That is a personal defence, confined to the borrower, his sureties, heirs, devisees and representatives; or to those persons only who are bound, by the original contract, to pay the sum borrowed. The Mechanics' Bank v. Edwards, 271*

V

VENDOR AND PURCHASER.

1. *Where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee, of the real estate, and the vendee a trustee for the vendor, of the purchase money. The vendee is treated as owner of the land, and it is devisable and descendible as his real estate. The money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him, as other personalty, and is distributable in the same manner, on his death. Swartwout v. Burr, 495*

2. *The trust in the vendor, for the vendee in such a case, attaches to the land, and binds the heirs of the former. ib*

3. *And if the vendor dies, before the execution of the contract, by the conveyance of the land and the payment of the purchase money, the purchase money must be paid to the personal representatives of the vendor. ib*

4. *Although courts of equity often give relief where there has been a failure in strictly complying with the terms of a contract, yet that is only done where*

there is some excuse for such failure. Relief is never granted to a purchaser where the failure has arisen from a determination on his part to abandon the contract, and where the vendor has acquiesced in such abandonment, and has in consequence made an agreement to sell the land to another purchaser, and has put him in possession of the property. Wood v. Perry, 114

5. *A purchaser of land has a right to buy up a prior contract between his vendor and another person for the sale of the land, with a view of extinguishing an outstanding incumbrance, and charging the vendor with the consideration money. But he has no right to procure such contract for the purpose of defeating the title under which he claims, and under which he is in possession of the land. That the law will not, and ought not to tolerate. ib*

See AGREEMENT, 11 to 17.

VENUE.

1. *Where a party meets an application made by his adversary to change the venue, by a stipulation not to give any evidence except as to facts occurring in the county where the venue is laid, the venue will not be changed. Smith v. Averill, 28*

2. *The section of the judiciary act which requires the venue to be laid in a county where some of the parties reside, means parties in interest, and not the nominal parties, or parties to the record. Hart v. Oatman, 229*

VERDICT.

Where there is evidence on both sides, upon a question of fact, the verdict of a jury, or a report of referees, will not be set aside on the ground that it is against the weight of evidence. Easterly v. Cole, 235

W

WAIVER.

1. *There may be an effectual waiver by parol, of a condition specified in a writ.*

ten, or even in a sealed, contract. *The Mayor, &c. of New-York v. Butler*, 325

2. It is well settled that a written contract may be waived by parol. And after a contract has been thus waived by one of the parties, neither he nor any one acting under him, can resuscitate it. *Wood v. Perry*, 114

See DEFALT, 2.

WARRANT.

See HABEAS CORPUS.

WARRANT OF ATTORNEY.

See JUDGMENTS, 6, 7.

WARRANTY.

See COVENANTS OF WARRANTY.

WILL.

I. EXECUTION OF.

1. General requisites.

1. What things are now necessary to the due execution of a will. *Butler v. Benson*, 526

2. Signature, or acknowledgment.

2. It seems the subscribing witnesses should sign the same in the presence of the testator. *ib*
3. The testator must subscribe his name at the end of the will; which subscription may be by his autograph, or by his mark; or, if he is unable to write, by another person in his presence and by his express direction. *ib*

4. The subscription must be made in the presence of the attesting witnesses, or must be acknowledged to them. The acknowledgment may be made to the witnesses separately, or the testator may subscribe and publish in the presence of one, and acknowledge his signature before another. When he subscribes or acknowledges he must declare the

instrument to be his last will and testament. And there must be at least two attesting witnesses; each of whom must sign as a witness at the end of the will, at the request of the testator, and at the time of the subscription or acknowledgment thereof and publication by the testator. *ib*

5. In ordinary cases, where persons are called in to witness a paper, which they do, in the presence of the testator; he at the same time subscribing it, and declaring that it is his last will and testament, a request to the witnesses to sign their names as witnesses may be presumed. *ib*

6. Under our statute of wills the testator must subscribe the will; and he must do this, or acknowledge it, in presence of the witnesses. And though he has subscribed it, if the subscription was not in the presence of the witnesses, publication is not a sufficient acknowledgment. *ib*

3. How proved.

7. If the subscribing witnesses to a will fail to prove the instrument, other witnesses may be called. Though the proof, in such cases, should be very clear. *ib*

4. When presumed.

8. Where the witnesses to a will are dead, or from the lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence existing, presumes the instrument properly executed, if there are no circumstances of suspicion; particularly where the attestation clause is full. *ib*

5. Old age of testator.

9. Old age, alone, in a testator, is not a sufficient ground for presuming imposition upon him. *ib*

II. CONSTRUCTION.

1. What passes.

10. A testator, whose will took effect previous to 1830, by the second clause thereof devised his real estate unto his four sons, R., A., I. and J., "to them and the heirs lawful from their bodies, share and share alike, and if any of my sons die without lawful issue, all

- his right, title and interest, in my real estate, shall devolve upon my surviving sons, to be equally divided among them. And if all my sons shall die without lawful issue, then the children of my daughters shall have all my real estate, to them, their heirs and assigns forever, but my grandsons shall have a double share each to each of my granddaughters." *Held* that an estate tail was given to the four sons of the testator by the primary devise to them; and that by virtue of the statute of 1786, abolishing entails, they became seised of the lands devised, in fee simple absolute. *Held also*, that the subsequent limitations of such lands, contained in the will, were null and void. *Barculo, J. dissented*; holding that the statute abolishing entails merely affected the primary devise in tail, by turning it into a fee simple, and left the secondary disposition to operate by way of executory devise. *Lott v. Wyckoff*, 565
11. Where, upon the whole will, there is a devise of an estate tail, either expressly or by implication, the act of 1786 applies. It does not annul the devise, but turns the estate tail into a higher estate. *Per Strong, P. J.* *ib*
12. The statute, however, does not, in terms, or by necessary implication, extend to determinable fees. *Per Strong, P. J.* *ib*
13. Where lands are devised to a person, in general terms, without words of limitation or perpetuity, the devisee takes but a life estate; unless the will contains something manifesting an intention on the part of the testator, to convey a greater estate than that embraced in the legal import of the terms of the devise. *Olmsted v. Harvey*, 102
14. The circumstance that a testator gives to his sons a remainder in real estate, after the expiration of the life estate of the widow, is no evidence of his intention to give them the fee. *ib*
15. Where land is devised indefinitely, and the devisee is directed to pay a gross or annual sum, he takes a fee. This rule is founded upon the ground that unless the devisee takes a fee, he might not live long enough to reimburse himself the amount of the charge; and therefore he might be injured by accepting the devise. And it applies to all cases of possible loss. *ib*
16. Where the land is charged in the hands of the devisee, with a sum to be paid, or a duty to be performed, by the devisee, which may require greater than a life estate, he takes a fee. *ib*
17. This rule is applicable to those cases in which the devisee is required, as a condition of the devise, to pay the testator's debts; or to pay legacies and funeral expenses; or to pay an annuity to a third person; or whenever the will imposes upon the devisee, in respect to the land, a duty which requires that he should take a fee. *ib*
18. Where the charge is on the land, simply, the devisee takes but a life estate. *ib*
19. Where a testator devised his real and personal estate to his wife for life, or during her widowhood, and directed his executors, after her decease, or marriage, to sell his real estate, the avails of which he gave and bequeathed as follows: one half thereof to be equally divided amongst the children of J. and P. T., and the other half between J. R., A. R. and J. R.; and A. R. died previous to the death or marriage of the widow, and before the sale of the real estate; *Held* that his share of the avails of the real estate became vested in him immediately upon the death of the testator, although not payable until after the sale. And that upon the death of A. R. unmarried and intestate, such share did not belong to the heirs of the testator as a lapsed legacy, but to the representatives of A. R. *Tucker v. Ball*, 94
2. Rules of construction.
20. In construing wills, a different principle prevails from that which is applicable in the construction of other instruments. *Olmsted v. Harvey*, 102
21. In regard to wills, courts are permitted to look beyond the mere phraseology of the devise, and gather the intention of the testator from the whole instrument. And if the context discloses an intention differing from that derived from the technical effect of the words of the particular

devise, the former must prevail. And thus a devise, without words of limitation, which, standing alone, gives a life estate, may be enlarged into a fee, by other parts of the will showing a clear intention to dispose of the whole estate. For the intention of the testator is the law of devises. *ib*

22. In ascertaining this intention, however, courts are governed by the principles which have been settled in adjudged cases. *ib*

23. The law is well settled that introductory words in a will may be accepted as explanatory of what follows, *juncta jacent*; but of themselves, they are never sufficient evidence of an intention to convey the whole estate. *ib*

24. And in all the cases where the estate given by the will has been enlarged by the courts, by implication, it has been done upon other words which, of themselves, without the introduction, would be sufficient to imply an intention to give the fee. *ib*

25. The true rule is that the introductory clause does not have the effect to enlarge the estate devised, unless the words of disposition, in the clause of devise, are connected, in terms, or sense, with the introductory clause, and import more than a mere description of the property. *ib*

26. In many cases, words of doubtful import in a will have acquired a meaning by legal interpretation. When that has been uniform, it becomes a rule of law; and it should govern all cases in which it is applicable, although it may be against the apparent intention of the testator. For it is better that the wishes of an individual should be defeated, in a particular instance, than that a rule of law established for the general good should be varied in its application. *ib*

27. As a general rule, it is fair to presume that a testator intends to give something, absolutely, to the persons named as legatees. *ib*

27. That inference should be conclusive, unless a condition is clearly annexed to the gift, or can be plainly inferred. *ib*

29. Courts of justice generally lean that way, from a disposition to carry into effect the will of the testator. *ib*

30. Where the words in a will, denoting a gift, are in the present tense, but the direction for the payment is in the future, the fair import of the language is that there is a present gift, of moneys, to be paid thereafter. *ib*

31. A direction for a division of an estate among several persons, by the executors, is equivalent to a direction for the payment, to the legatees, of their respective shares. *ib*

32. In such cases the interest is vested, and transmissible. *ib*

33. The rule that a testator is to be deemed to have intended that the same words, used in different parts of his will, should convey the same interests, is a sound one; and wills should be construed accordingly. *ib*

See WITNESS.

WITNESS.

1. Where, in a suit for the recovery of dower, a former owner of the land, who has conveyed the same, by warranty deed, to the person from whom the defendant derives his title, is introduced as a witness for the defendant, a release executed by the defendant to the witness is good and valid, and removes the objection to his competency on the ground that he will be liable over to his grantee, or to the defendant, in case of a recovery by the plaintiff in the suit for dower. *Cunningham v. Knight*, 399

2. It is sufficient if, at the time of testifying, the witness is disinterested. It is not a question whether he may, by possibility, or in the course of events, become interested. *ib*

3. A witness will not be allowed to disqualify himself, and thus deprive a party of the benefit of his testimony, by his own declarations showing a bad feeling against the opposite party. *Clark v. Brown*, 215

4. A witness may use a memorandum to refresh his recollection. But it is not evidence to go to the jury; even though

he swears he thinks it correct. He may refresh his memory, and then, if his recollection recalls the transaction, that recollection is testimony to go to the jury. The witness must be conscious of the reality of the matters he swears to, at the time he testifies. It is not sufficient that his mind recurs to the memorandum, and that he himself believes that true. *Butler v. Benson*, 526

drew the will, as to the facts attending its execution.

See EVIDENCE, 8, 9, 10.

WRIT OF ERROR.

See ERROR.

WRIT OF INQUIRY.

See DAMAGES.

5. How far the attestation clause in a will can be used as a memorandum to refresh the memory of the scrivener who

END OF VOLUME ONE.

L. J. P. T. J.



